No. 99-1786

FILED
MAY 10 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

JEFFREY S. POP*
JEFFREY S. POP & ASSOCIATES
A LAW CORPORATION
9107 Wilshire Boulevard
Suite 600
Beverly Hills, California 90210
(310) 273-5462

Counsel for Respondents

JAMES F. JORDEN*
WALDEMAR J. PFLEPSEN, JR.
STEPHEN H. GOLDBERG
JORDEN BURT LLP
1025 Thomas Jefferson Street, N.W.
Suite 400 East
Washington, D.C. 20007
(202) 965-8100

THOMAS H. LAWRENCE
JOHN M. RUSSELL
HALE HEADRICK DEWEY WOLF GOLWEN THORNTON & CHANCE
1727 Kirby Parkway
Suite 150
Memphis, Tennessee 38120
(901) 888-4006

DAVID C. ASPINWALL
GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY
8515 East Orchard Road
Englewood, Colorado 80111

Counsel for Petitioners

Counsel of Record

Petition For Certiorari Filed May 9, 2000
Certiorari Granted January 22, 2001

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Relevant Docket Entries. 1

Services Agreement (Great-West & Earth Systems, Inc.). 24

Stop-Loss Contract. 34

Stop-Loss Contract, Schedule A (3-21-91). 46

Stop-Loss Contract, Schedule A (8-29-91). 50

Summary Plan Description (relevant portions). 54

Declaration of Louis A. Tuccitto, dated March 13, 1998, including the following attachments: 67

Right of Recovery Correspondence from August-September 1992. 71

Right of Recovery Agreement, dated October 20, 1992. 77

Right of Recovery Questionnaire, dated October 29, 1992. 79

Complaint, dated May 19, 1997 81

Verified First Amended Complaint, dated July 3, 1997 87

Order Denying Plaintiffs' Ex Parte Application for Temporary Restraining Order, dated July 9, 1997 96

Defendant Janette Knudson's Answer to Plaintiffs' First Amended Verified Complaint, dated August 21, 1997, including the following attachments: 100

Declaration of Janette Knudson, dated March 24, 1997. 112

TABLE OF CONTENTS – Continued

Page

The Janette Knudson Special Needs Trust, dated March 24, 1997 115

Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (Probate Code § 3111) and for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, dated July 23, 1997 ... 139

Petition for Order Directing the Net Money to be Paid to the Janette Knudson Special Needs Trust and for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, dated March 24, 1997 ... 145

Conditional Release of All Claims, dated March 7, 1997 161

Notice of Removal, dated April 21, 1997 167

Order Granting Plaintiffs' Motion to Remand, dated June 27, 1997 171

Declaration of Jerol J. Brown in Support of Plaintiffs' Motion for Summary Judgment and for Preliminary Injunction, dated December 8, 1997 ... 176

Supplemental Declaration of Jerol J. Brown, dated March 10, 1998 183

Second Supplemental Declaration of Jerol J. Brown, dated March 16, 1998 206

Defendant Janette Knudson's Statement of Uncontroverted Facts and Conclusions of Law in Support of the Cross-Motion for Summary Judgment, dated February 2, 1998 210

Stipulation of Facts Between the Parties, dated February 9, 1998 231

TABLE OF CONTENTS – Continued

Page

Order Granting Defendants' Motion for Summary Judgment, dated May 14, 1998 237

Memorandum from the United States Court of Appeals, Ninth Circuit, dated February 7, 2000 ... 250

DOCKET ENTRIES

LC022329

Los Angeles Superior Court

Janette Knudson, et al vs. Hyundai Motors of America

REGISTER OF ACTIONS

5/16/1994	ASC/TSC SET ON 8/16/94 AT 1:30PM IN NW"A"
6/27/1994	VAST DATE SET ON 9/28/94 AT 1:30PM IN NW"H"
8/16/1994	TRIAL SET ON 1/11/96 AT 9:00AM IN NW"A"
8/16/1994	ASC/TSC HELD
8/16/1994	MSC SET ON 12/11/95 AT 8:30AM IN NW"M"
8/17/1994	LAW & MOTION SET ON 11/04/94 AT 9:00AM IN NW"M"
9/28/1994	NOT SETTLED AT MSC
9/28/1994	TRIAL DATE STANDS
9/28/1994	VAST HEARING HELD
11/4/1994	MOTION GRANTED
11/4/1994	LAW & MOTION HELD
4/18/1995	LAW & MOTION SET ON 5/01/95 AT 9:00AM IN NW"Z"
5/1/1995	OFF CALENDAR
5/1/1995	LAW & MOTION HELD
11/20/1995	MINUTE ORDER PRODUCED

11/20/1995	LAW & MOTION SET ON 12/14/95 AT 9:00AM IN NW"Z"
11/20/1995	MSC DATE ADVANCED AND CONTINUED FROM 12/11/95 AT 8:30AM IN NW"M"
11/20/1995	MSC SET ON 12/11/95 AT 8:30AM IN NW"I"
11/21/1995	TRIAL DATE ON 1/11/96 AT 9:00AM IN NW"A" ADVANCED AND VACATED
11/21/1995	MSC DATE ON 12/11/95 AT 8:30AM IN NW"I" ADVANCED AND VACATED
11/21/1995	STATUS CONFERENCE SET ON 1/04/96 AT 1:30PM IN NW"A"
11/21/1995	MINUTE ORDER PRODUCED
12/1/1995	LAW & MOTION DATE ON 12/14/95 AT 9:00AM IN NW"Z" ADVANCED AND VACATED
1/4/1996	TRIAL SET ON 4/23/97 AT 9:00AM IN NW"A"
1/4/1996	STATUS CONFERENCE HELD
1/4/1996	MSC SET ON 3/13/97 AT 8:30AM IN NW"H"
1/16/1996	ANSWER TO CROSS COMPLAINT OF HYUNDAI MOTOR AMERICA, HYUNDAI MOTOR COMAPNY [sic] AND GALPIN MOTORS, LTD. FILED BY DAVID C. LEDERER (XDEFDNT) – REPRESENTING ERIC KNUDSON
6/14/1996	CHANGE OF ADDRESS FILED BY LAW OFFICES OF DAVID C. LEDERER (PLAINTIFF) – REPRESENTING ERIC KNUDSON.

3/7/1997	EX PARTE ORDER – APPLICATION FOR SHORTENING TIME, HELD. MSC & TRIAL DATES, CONTINUED. FILED BY JEFFREY S. POP (PLAINTIFF) – REPRESENTING JANETTE KNUDSON. FEES PAID $14.00 ORDER SIGNED BY THOMAS SCHNEIDER.
3/7/1997	MSC DATE ON 3/13/97 AT 8:30AM IN NW"H" ADVANCED AND VACATED
3/7/1997	TRIAL DATE ADVANCED AND CONTINUED FROM 4/23/97 AT 9:00AM IN NW"A"
3/7/1997	TRIAL SET ON 4/30/97 AT 9:00AM IN NW"A"
3/7/1997	MINUTE ORDER PROCESSED IN DEPARTMENT A
3/26/1997	PLAINTIFF, JANETTE KNUDSON, MOTION TO APPROVE SETTLEMENT AND PETITION FOR ORDER DIRECTING THE NET MONEY TO BE TO TRUST AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDICAL AND OTHER DISPUTED CREDITORS. $14.00 SET ON 4/23/1997 AT 9:00AM IN DEPARTMENT Z
4/22/1997	NOTICE OF REMOVAL FILED BY MCKINGHT, HUDSON, LEWIS (DEFENDANT) – REPRESENTING GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY.
4/23/1997	MOTION GRANTED
4/30/1997	STATUS RE REMOVAL FROM FEDERAL COURT AND SETTLEMENT CONTINUED

	TO 6/2/1997 AT 9:00AM IN DEPARTMENT A
6/2/1997	TRIAL CONTINUED TO 7/01/97 AT 9:00AM IN NW"A"
7/1/1997	TRIAL CONTINUED TO 9/03/97 AT 9:00AM IN NW"A"
7/7/1997	PLAINTIFF, JANETTE KNUDSON, MOTION FOR ORDER APPROVING SETTLEMENT AND PETITION DIRECTING THE NET MONEY TO BE PAID TO TRUST. $14.00 SET ON 7/23/1997 AT 9:00AM IN DEPARTMENT Z
7/22/1997	ORDER APPROVING SETTLEMENT AND PETITION DIRECTING THE NET MONIES TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (PROBATE CODE 3111) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDI-CAL AND OTHER DISPUTED CREDITORS (NWZ)
7/23/1997	MOTION GRANTED
8/14/1997	REQUEST FOR DISMISSAL WITH PREJUDICE AS TO COMPLT
8/14/1997	REQUEST FOR DISMISSAL WITH PREJUDICE AS TO XCOMPLT BY HYUNDAI MOTOR CO. FILED ON NOVEMBER, 1995
8/14/1997	REQUEST FOR DISMISSAL WITH PREJUDICE AS TO ENTIRE ACTION
8/14/1997	REQUEST OF DISMISSAL FILED
9/3/1997	OFF CALENDAR

97-CV-3745

U.S. District Court
Central District of California (Western Div.)

Great-West Life Ann. v. Janette Knudson, et al.

5/19/97	1	COMPLAINT filed Summons(es) issued referred to Discovery R. J. Groh (jp) [Entry date 05/20/97]
7/7/97	2	EX PARTE APPLICATION filed by plaintiff Great-West Life Ann for temporary restraining order (shb) [Entry date 07/08/97]
7/7/97	—	LODGED/ (3) PROPOSED ORDER submitted by plaintiff Great-West Life Ann for exparte motion for temporary restraining order [2-1]. (FWD TO CRD) (shb) [Entry date 07/08/97]
7/7/97	3	DECLARATION of Linda Claxton Johnson by plaintiff Great-West Life Ann in suppt of ex parte appl for tro [2-1] (shb) [Entry date 07/08/97]
7/7/97	4	MEMORANDUM of Points & Authorities by plaintiff Great-West Life Ann in support of exparte motion for temporary restraining order [2-1] (shb) [Entry date 07/08/97]
7/7/97	5	FIRST AMENDED COMPLAINT by plaintiff Great-West Life Ann Summons Issued on 1st Amd Cmp (shb) [Entry date 07/08/97]
7/8/97	7	OPPOSITION by defendant Eric Knudson to ex parte appl for tro [2-1]; Memo of Points & Authroities [sic]; Request for

monetary sanctions; Decl of David Lederer (shb) [Entry date 07/10/97]

7/8/97 7 REQUEST by defendant Eric Knudson for monetary sanctions (shb) [Entry date 07/10/97]

7/8/97 8 PROOF OF SERVICE by defendant Eric Knudson of Opposition to ex parte appl for tro; Memo of Points & Authorities and request for monetary sanctions; Decl of David Lederer served upon (See mailing list on original document) served on 7/8/97 via US mail (shb) [Entry date 07/10/97]

7/8/97 10 DECLARATION of Thomas H. Lawrence by plaintiff Great-West Life Ann in suppt of appl for tro [2-1], amd proposed ords [0-0] (shb) [Entry date 07/10/97]

7/9/97 6 ORDER by Judge James M. Ideman denying exparte motion for temporary restraining order [2-1]. (ENT 7/10/97), mld cpys & ntcs. (tw) [Entry date 07/10/97]

7/9/97 9 Jeffrey Pop's Special Appearance in OPPOSITION by defendant Janette Knudson to Request for TRO to pltfs appl for tro on behalf of dft Janette Knudson [2-1] (shb) [Entry date 07/10/97]

7/14/97 11 APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for plaintiff Great-West Life Ann by Thomas H Lawrence. Designating Linda Claxton as local counsel. Approved by Judge James M. Ideman – (Fee pd) (shb)

8/27/97 12 RETURN OF SUMMONS and proof of service of summons, first amended complaint and related documents executed upon defendant Janette Knudson on 8/20/97 via personal service (shb) [Entry date 08/28/97]

9/17/97 13 ANSWER filed by defendant Janette Knudson to first amnd complaint [5-1] (tw) [Entry date 09/18/97]

9/17/97 14 DEMAND for jury trial by defendant Janette Knudson (tw) [Entry date 09/18/97]

12/8/97 15 NOTICE OF MOTION AND MOTION by plaintiff Great-West Life Ann for leave to file second amended complaint; Memo of points and authorities; motion hearing set for 10:00 12/29/97 (shb) [Entry date 12/09/97]

12/8/97 — LODGED/PROPOSED ORDER submitted by plaintiff Great-West Life Ann for motion for leave to file second amended complaint [15-1]. (FWD TO CRD) (shb) [Entry date 12/09/97]

12/8/97 16 NOTICE OF MOTION AND MOTION by plaintiff Great-West Life Ann to strike jury demand; motion hearing set for 10:00 12/29/97 (shb) [Entry date 12/09/97]

12/8/97 17 MEMORANDUM by plaintiff Great-West Life Ann in support of motion to strike jury demand [16-1] (shb) [Entry date 12/09/97]

12/8/97 18 NOTICE OF MOTION AND MOTION by plaintiff Great-West Life Ann for preliminary injunction; motion hearing set for

10:00 12/29/97 (shb) [Entry date 12/09/97]

12/8/97 — LODGED Statement of facts submitted by plaintiff Great-West Life Ann (FWD TO CRD) (shb) [Entry date 12/09/97]

12/8/97 19 DECLARATION of Jerol J. Brown by plaintiff Great-West Life Ann in suppt of mot for preliminary injunction [18-1] (shb) [Entry date 12/09/97]

12/8/97 20 MEMORANDUM of points and authorities by plaintiff Great-West Life Ann in support of motion for preliminary injunction [18-1] (shb) [Entry date 12/09/97]

12/8/97 21 DECLARATION of Louis A Tuccitto by plaintiff Great-West Life Ann in suppt of mot for prelim inj [18-1] (shb) [Entry date 12/09/97]

12/8/97 22 DECLARATION of Pat Fry by plaintiff Great-West Life Ann re in suppt of mot for preliminary inj [18-1] (shb) [Entry date 12/09/97]

12/8/97 23 PROOF OF SERVICE by plaintiff Great-West Life Ann of verified second amd cmp; ntc of mot and mot for leave to file 2nd amd cmp; memo of points and authorities; ntc of mot and mot for pltfs for prel inj; decl of Louis Tuccitto in suppt; Decl of Pat Fry in suppt of mot for s/j; nt of mot and mot to str jury demand; memo of law in suppt of mot to strike jury demand . . . served upon Jeffrey Pop and Ms Louise Curinga on 12/8/97 by personal service. (shb) [Entry date 12/09/97]

12/9/97 24 ORDER by Judge James M. Ideman re oaral [sic] argument. Oral argument will be permitted in two exceptions: (a) when desired by the court and (b) when desired by counsel. In this case, cnsl shall file a request in writing for oral argument. This request must be suppt by a showing that oral arg is necessary under the particular circumstances of the case, and a further showing as to why the written briefs are inadequate to present cnsls position to the court. This request and showing shall be filed NLT 10 days before the hrg. The moving pty is ord to lodge with the crt proposed ords relating to the filed mot. This ord shall be loeged [sic] with the crt NLT 10 days after the filing of the mot. The ord shall contain a brief synopsis of the facts and applicable law suppt your mot. (shb) [Entry date 12/10/97]

12/9/97 27 NOTICE OF MOTION AND MOTION by plaintiff Great-West Life Ann for summary judgment; motion hearing set for 10:00 12/29/97 (shb) [Entry date 12/11/97]

12/9/97 28 MEMORANDUM of law by plaintiff Great-West Life Ann in support of motion for summary judgment [27-1] (shb) [Entry date 12/11/97]

12/10/97 25 ORDER by Judge James M. Ideman re oral argument. Oral argument will be permitted in two exceptions: (a) when desired by the court; and (b) when desired by cnsl. In this case, cnsl must fule [sic] a request in writing for oral arg. This req must be suppt by a showing that

oral arg is necessary under the particular circumstances of the case, and a further showing as to why the written briefs are inadequate to present cnsls position to the court. This request and showing shall be filed NLT 10 days before the hrg. The moving pty is ord to lodge with the crt proposed ords relating to the mot. The ord shall be lodged with the crt NLT 10 days after the filing of the mot. The order shall contain a brief synopsis of the facts and applicable law suppt your mot. (shb) [Entry date 12/11/97]

12/10/97 26 NOTICE OF DISCREPANCY AND ORDER by Judge James M. Ideman that the mot for s/j and suppt docs received on 12/9/97 is to be filed and processed. (shb) [Entry date 12/11/97]

12/10/97 29 STIPULATION for continuance of motion [27-1], re [18-1], re [16-1], re [15-1] (shb) [Entry date 12/12/97]

12/10/97 — LODGED/PROPOSED ORDER submitted by defendant Janette Knudson for stipulation [29-1]. (FWD TO CRD) (shb) [Entry date 12/12/97]

12/12/97 30 ORDER by Judge James M. Ideman resetting hearing on motion for summary judgment [27-1] 2/23/98, resetting hearing on motion for preliminary injunction [18-1] 2/28/98, resetting hearing on motion to strike jury demand [16-1] 2/28/98, resetting hearing on motion for leave to file second amended complaint [15-1] 2/28/98 (shb) [Entry date 12/15/97]

12/19/97 31 PROOF OF SERVICE mail by plaintiff Great-West Life Ann on 2/18/97 of ord re oral arg by mail to Leffrey [sic] S Pop, Esq. & Ms. Louise Curinga (kh) [Entry date 12/22/97] [Edit date 12/24/97]

1/13/98 32 ORDER by Judge James M. Ideman re oral arg. (ab) [Entry date 01/28/98]

1/13/98 33 NOTICE OF MOTION AND MOTION by plaintiff Great-West Life Ann to disqualify; motion hearing set for 10:00 2/2/98 (ab) [Entry date 01/28/98]

1/13/98 34 Memo of PA by plaintiff Great-West Life Ann to motion to disqualify [33-1] (ab) [Entry date 01/28/98]

1/20/98 35 Opp by defendant Janette Knudson to motion to disqualify [33-1] her atty; decl of Janette Knudson and Jeffrey S. Pop in suppt. (ab) [Entry date 01/28/98]

1/20/98 36 PROOF OF SERVICE by plaintiff Great-West Life Ann on 1/16/98 of oral arg. (ab) [Entry date 01/28/98]

1/28/98 47 STIPULATION and ORDER by Judge James M. Ideman resetting hearing on motion to disqualify [33-1] 2/23/98 NO TIME GIVEN AS TO THE CONTINUATION DATE; and plfs reply is due on 2-2-98. (AB) [Entry date 02/04/98]

2/2/98 37 NOTICE OF CROSS-MOTION AND CROSS-MOTION by defendant Janette Knudson for summary judgment against all pltfs on first amd cmp, or in the alt for summary adjudication of issues; motion hearing set for 2/23/98 (shb) [Entry date 02/03/98] [Edit date 02/03/98]

2/2/98 — LODGED/PROPOSED ORDER submitted by defendant Janette Knudson for motion for summary judgment against all pltfs on first amd cmp [37-1], for motion for summary adjudication of issues [37-2]. (FWD TO CRD) (shb) [Entry date 02/03/98]

2/2/98 — LODGED Statement of uncontroverted facts and conclusions of law submitted by defendant Janette Knudson (FWD TO CRD), (shb) [Entry date 02/03/98]

2/2/98 38 MEMORANDUM of points and authorities by defendant Janette Knudson in support of Cross-motion for summary judgment against all pltfs on first amd cmp [37-1], of motion for summary adjudication of issues [37-2] (shb) [Entry date 02/03/98] [Edit date 02/03/98]

2/2/98 39 REQUEST by defendant Janette Knudson for lodging (lodged orig depos) (shb) [Entry date 02/03/98]

2/2/98 40 REQUEST by defendant Janette Knudson for judicial ntc of prior case (shb) [Entry date 02/03/98]

2/2/98 41 APPENDIX OF EXHIBITS filed by defendant Janette Knudson for dfts cross motion for summary judgment and for dfts [37-1], Opposition to pltfs mot for summary jgm, declarative relief, and to file 2nd amd cmp [27-1] (VOL I OF IV) [Bates No. 00001 to 000196] (shb) [Entry date 02/03/98] [Edit date 02/03/98]

2/2/98 42 APPENDIX of Exhibits filed by defendant Janette Knudson for cross motion for

summary judgment [37-1], and for Opposition to pltfs mots for summary judgment, declarative relief and to file 2nd amd cmp [27-1] (VOL II of IV) [Bates No. 000197-000483] (shb) [Entry date 02/03/98]

2/2/98 43 APPENDIX of Exhibits filed by defendant Janette Knudson for dfts cross mot for summary judgment [37-1], and for opp to pltfs mot for summary judgment, decl relief, and to file 2nd amd cmp [27-1] (VOL III OF IV) [Bates No. 000484 to 000818] (shb) [Entry date 02/03/98]

2/2/98 44 APPENDIX OF EXHIBITS filed by defendant Janette Knudsonfor [sic] dfts cross mot for summary jgm [37-1], and for dfts Opposition to pltfs summary jgm, declarative relief, and to file 2nd amd cmp [27-1] (VOL IV OF IV) [Bates No. 000819 to 001138] (shb) [Entry date 02/03/98] [Edit date 02/03/98]

2/2/98 45 PROOF OF SERVICE by defendant Janette Knudson on 2/2/98 of appendix of exhibits for dfts cross mot for s/j and for dfts opp to pltfs mor for s/j; declarative relief and to file 2nd amd cmp served upon Linda Claxton Johnson by personal service (shb) [Entry date 02/03/98]

2/2/98 46 PROOF OF SERVICE by defendant Janette Knudson on 2/2/98 of append of exhs for dfts cross mot for s/j and for opp to pltrsmots for s/j, decl rel, and to file 2nd amd cmp served upon Thomas Lawrence by express mail (shb) [Entry date 02/03/98)

2/3/98	48	ORDER by Judge James M. Ideman re ORAL ARGUMENT. Oral arg willbe [sic] permitted in 2 exceptions: (a) when desired by the crt and (b) when desired by cnsl. In this case cnsl shall file a request in writing for oral argument. This request must be suppt by a showing that oral arg is necessary under the particular circumstances of the case, and a further showing as to why the written briefs are inadequate to present cnsls position to the crt. This request and showing shall be filed NLT 10 days before the hrg. The mov pty is ord to lodge with the crt proposed ords relating to the filed mot. This ord shall be lodged with the crt NLT 10 days agftger [sic] the filing of the mot. The ord shall contain a br synopsis of the facts and applicable law suppt your mot. (shb) [Entry date 02/04/98]
2/3/98	49	Reply by plaintiff Great-West Life Ann to motion to dfts opposition to motion to disqualify [33-1] (shb) [Entry date 02/05/98]
2/9/98	50	OPPOSITION by defendant Janette Knudson to motion/req for preliminary injunction [18-1] (ab) [Entry date 02/11/98]
2/9/98	51	OPPOSITION by defendant Janette Knudson to motion to strike jury demand [16-1] (ab) [Entry date 02/11/98]
2/9/98	52	EVID OBJECTIONS by defendant Janette Knudson to the decl of Jerol Brown and Patricia Fry and mot to strike such evid as well to strke [sic] ref to unpublished cases attached to plfs mot for S/J and arg thereon. (ab) [Entry date 02/11/98]

2/9/98	52	REQUEST/MOTION by defendant Janette Knudson to strike such evid as well to strike ref to unpublished cases attached to plfs mot for S/J and arg thereon. (ab) [Entry date 02/11/98]
2/9/98	53	P&A IN OPPOSITION by defendant Janette Knudson to motion for summary judgment [27-1] (ab) [Entry date 02/11/98]
2/9/98	54	STATEMENT genuine issues in opp by defendant Janette Knudson to motion for summary judgment [27-1]; and stmt of facts and conclusions of law in opp to pfls mot for S/J; decl of David Lederer Esq. (ab) [Entry date 02/11/98]
2/9/98	55	DECLARATION of Jeffrey S. Pop by defendant Janette Knudson (ab) [Entry date 02/11/98]
2/9/98	56	OPPOSITION by defendant Janette Knudson to motion for leave to file second amended complaint [15-1]; memo of PA. (ab) [Entry date 02/11/98]
2/12/98	58	PROOF OF SERVICE by defendant Janette Knudson on 2/12/98 of ord re: oral arg. (ab) [Entry date 02/23/98]
2/13/98	57	STIPULATION for cont of ntc of mot for lv to file 2nd a/C; mot for P/I; mot to strike Jury dmd; and mot for plfs W/J and mot for dfts crs mot for S/J. (ab) [Entry date 02/23/98]
2/13/98	—	LODGED/PROPOSED ORDER submitted by defendant Janette Knudson for stipulation [57-1]. (FWD TO CRD) (ab) [Entry date 02/23/98]

2/13/98 59 STIPULATION of facts btween the ptys. (ab) [Entry date 02/23/98]

2/13/98 61 NOTICE by plaintiff Great-West Life Ann of change of firm name and firm affiliation for plf atty. (ab) [Entry date 02/26/98]

2/20/98 60 ORDER by Judge James M. Ideman resetting hearing on motion for summary judgment against all pltfs on first amd cmp [37-1] 3/23/98, resetting hearing on motion for summary adjudication of issues [37-2] 3/23/98 NO TIME GIVEN AS TO THE CONTINUATION DATES GIVEN both w/out prej to either of the ptys req this crt for a cont upon good cause shown. (ab) [Entry date 02/24/98]

3/9/98 66 DECLARATION of Thomas H. Lawrence by plaintiff Great-West Life Ann re motion for summary jugment against all pltfs on first amd cmp [37-1] (ab) [Entry date 03/13/98]

3/10/98 62 NOTICE by defendant Janette Knudson of ldging orig depo transc of Louis A. Tuccitto. (ab) [Entry date 03/13/98]

3/10/98 — LODGED 2 depos submitted by defendant Janette Knudson (FWD TO CRD) (ab) [Entry date 03/13/98]

3/10/98 63 RESPONSE by plaintiff Great-West Life Ann to to [sic] motion for summary judgment against all pltfs on first amd cmp [37-1] (ab) [Entry date 03/13/98]

3/10/98 64 SUPPL DECLARATION of Jerol J. Brown by plaintiff Great-West Life Ann re motion for summary judgment against all

pltfs on first amd cmp [37-1] (ab) [Entry date 03/13/98]

3/10/98 65 STATEMENT genuine issues purs to L/R 7.14.2 by plaintiff Great-West Life Ann re motion for summary judgment against all pltfs on first amd cmp [37-1] (ab) [Entry date 03/13/98]

3/10/98 67 Table Contents and table of auth re resp by plaintiff Great-West Life Ann to motion for summary judgment against all pltfs on first amd cmp [37-1] (ab) [Entry date 03/13/98]

3/13/98 68 NOTICE by plaintiff Great-West Life Ann of lodging depo transcr (tw) [Entry date 03/17/98]

3/16/98 70 DECLARATION of Thomas H. Lawrence by plaintiff Great-West Life Ann in suppt of plfs replies re motion for summary judgment [27-1], motion for preliminary injunction [18-1] (tw) [Entry date 03/19/98]

3/16/98 71 Second Suppl DECLARATION of Jerol J. Brown by plaintiff Great-West Life Ann (tw) [Entry date 03/19/98]

3/16/98 72 DECLARATION of Louis A. Tuccitto by plaintiff (tw) [Entry date 03/19/98]

3/16/98 73 REPLY by plaintiff Great-West Life Ann to Knudson's opp to motion for summary judgment [27-1] (tw) [Entry date 03/19/98]

3/16/98 74 REPLY by plaintiff to dft's opp to plfs motion for preliminary injunction [18-1], motion for leave to file second amended

		complaint [15-1] (tw) [Entry date 03/19/98]
3/16/98	75	REPLYbrief [sic] & points & authorities by defendant Janette Knudson supporting Knudson's X motion for summary judgment [37-1] (tw) [Entry date 03/20/98]
3/17/98	69	Errata to plfs REPLY by plaintiff Great-West Life Ann to Knudson's opp to plfs' motion for summary judgment [27-1] (tw) [Entry date 03/19/98]
3/23/98	76	RESPONSE by plaintiff Great-West Life Ann to dfts evidentiary objs [52-1] (tw) [Entry date 03/26/98]
3/26/98	77	OBJECTIONS by defendant Janette Knudson to pltfs response to evidentiary objections as untimely to and improper submission of suppl decl [76-1] (shb) [Entry date 03/27/98]
4/16/98	78	RESPONSE by plaintiff Great-West Life Ann to dfts obj to plfs resp to evidentiary objs as untimely & improper submissions of suppl decls [77-1] (tw) [Entry date 04/17/98]
5/18/98	79	ORDER by Judge James M. Ideman granting motion for summary judgment [37-1]. (ENT 5/20/98) mld cpys & ntc (pbap) [Entry date 05/20/98]
5/18/98	80	STATEMENT of of Uncontroverted Facts and Concl of Law by defendant Janette Knudson in support of [37-1]. (ENT 5/20/98) mld cpys & ntc (pbap) [Entry date 05/20/98]
5/18/98	81	JUDGMENT by Judge James M. Ideman S/J has been grntd in favor of Dfts in this

		case. It is hereby adj that Plfs take nothing by their cmp. terminating case. (ENT 5/20/98) MD JS 6 mld cpys & ntc (pbap) [Entry date 05/20/98]
6/3/98	82	NOTICE by defendant Janette Knudson of appearance to tax costs (tw) [Entry date 06/04/98]
6/3/98	83	MEMORANDUM of PA by defendant Janette Knudson in support of Bill of cost notice [82-1] (tw) [Entry date 06/04/98]
6/3/98	84	BILL OF COSTS RETURNABLE submitted by defendant Janette Knudson re [81-2]; bill of cost hearing set on 9:00 6/22/98 (tw) [Entry date 06/04/98]
6/3/98	85	NOTICE OF MOTION AND MOTION by defendant Janette Knudson for attorney fees; motion hearing set for 10:00 7/6/98 (lc) [Entry date 06/05/98]
6/3/98	86	MEMORANDUM IN SUPPORT by defendant Janette Knudson of motion for attorney fees [85-1] (lc) [Entry date 06/05/98]
6/4/98	87	MOTION by plaintiff Great-West Life Ann to reconsideration ord gr dft's mot for sum jgmt & deny plfs' mot for sum jgmt; motion hearing set for 10:00 7/6/98 (tw) [Entry date 06/08/98]
6/4/98	88	MEMORANDUM IN SUPPORT by plaintiff Great-West Life Ann of motion to reconsideration ord gr dft's mot for sum jgmt & deny plfs' mot for sum jgmt [87-1] (tw) [Entry date 06/08/98]
6/4/98	90	ORDER re oral argument by Judge James M. Ideman (tw) [Entry date 06/08/98]

6/5/98	89	ORDER Re: Oral argument by Judge James M. Ideman (tw) [Entry date 06/08/98]
6/10/98	91	NOTICE re order [90-1] (ap) [Entry date 06/12/98]
6/15/98	92	DECLARATION of Thomas H Lawrence by plaintiff Great-West Life Ann re motion to reconsideration ord gr dft's mot for sum jgmt & deny plfs' mot for sum jgmt [87-1] (el) [Entry date 06/16/98]
6/19/98	93	NOTICE by plaintiff Great-West Life Ann of filing alternative proposed orders (tw) [Entry date 06/22/98]
6/22/98	94	RESPONSE by plaintiff Great-West Life Ann in opp to motion for attorney fees [85-1] (el) [Entry date 06/23/98]
6/22/98	95	MEMORANDUM of PA by defendant Eric Knudson in opposition to motion to reconsideration ord gr dft's mot for sum jgmt & deny plfs' mot for sum jgmt [87-1] (el) [Entry date 06/23/98]
6/24/98	—	COSTS taxed for defendant Janette Knudson in the amount of $4,981.62 against plaintiff Great-West Life Ann (cc: all counsel); bill of cost hearing held. (ab) [Entry date 06/26/98]
6/29/98	97	MEMORANDUM of PA by defendant Janette Knudson in support of motion for attorney fees [85-1]; decl of Richard S MacNaughton Esq (el) [Entry date 07/10/98]
6/29/98	98	REPLY by plaintiff Great-West Life Ann to response to motion to reconsideration

ord gr dft's mot for sum jgmt & deny plfs' mot for sum jgmt [87-1] ~~(el)~~ [Entry date 07/10/98]

7/9/98	96	ORDER by Judge James M. Ideman denying motion to reconsideration ord gr dft's mot for sum jgmt & deny plfs' mot for sum jgmt [87-1], granting motion for attorney fees [85-1] (ENT 7/10/98), mld cpys & ntcs. (tw) [Entry date 07/10/98]
8/7/98	99	NOTICE OF APPEAL/REPRESENTATION STATEMENT by plaintiffs Great-West Life Ann; Earth System, Inc.; Health & Welfare Plan for Employees of Earth Systems, Inc., to 9th C/A from Dist. Court ord ent 7/10/98 [96-1], jgm ent 5/20/98 [81-2] (cc: Lewis Fisher Henderson & Claxton; Jeffrey S. Pop & Associates) Fee: Paid. (ghap)

98-56472

U.S. Court of Appeals for the Ninth Circuit

Great-West Life v. Knudson, et al.

3/22/00 Filed order (Betty B. FLETCHER, Harry PREGERSON, Charles R. Weiner): The panel has voted unanimously to deny the petition for rehearing. Judge Pregerson voted to deny the petition for rehearing en banc and Judges B. Fletcher and Weiner so recommended. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P.35. The petition for rehearing is denied and the petition for rehearing en banc is rejected. [3853283-1] [98-56472] (cha)

3/28/00 Filed Appellant Great-West Life Annu's motion to stay the mandate. [98-56472] served on 3/27/00 [PANEL] [98-56472] (mhf)

3/28/00 Filed Aplts' mtn for reconsideration of denial of pet for rhrg en banc & Notice of Addl Authority in support of; [98-56472] served on 3/17/00 [PANEL] [98-56472] (mhf)

4/3/00 Filed order (Betty B. FLETCHER, Harry PREGERSON, Weiner): The appellees' request for attorneys' fees on appeal is denied. [3861327-1] [98-56472] (cha)

4/4/00 Filed order (Betty B. FLETCHER): Appellants Motion to Stay the Mandate is granted. The mandate shall reissue nintey [sic] (90) days from the date this order, unless appellants file a petition for a writ of certiorari in the Supreme Court and give notice to our Clerk is

writing within said ninety day period. In that case, the mandate shall remain withdrawn until the Supreme Court's final disposition. [3878384-1] [98-56472] (cha)

4/10/00 Filed Appellant's mtn to direct clk's office to distribute aplt's mtn for reconsideration of denial of pet for rhrg en banc to all active judges [98-56472] served on 3/27/00 [PANEL] [98-56472] (mhf)

5/15/00 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1786 filed on 5/9/00. [98-56472] (dg)

2/1/01 Received notice from Supreme Court, petition for certiorari GRANTED on 1/22/01. Supreme Court No. 99-1786 (PANEL by fax) (dg)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC. Plaintiffs v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Defendants.	Case No.: CV 97-3745 JMI (JGx)

SERVICES AGREEMENT

This Agreement entered into on JANUARY 1, 1990.

Between
THE GREAT-WEST LIFE ASSURANCE COMPANY,
hereinafter referred to as "GREAT-WEST"

and

EARTH SYSTEMS, INC.

hereinafter referred to as "the Contractholder."

Whereas the Contractholder has established a Health Care Payment Plan or Health Care Payment Plan and

Trust for the benefit of its Employees and Dependents (hereinafter referred to as the "Plan");

And Whereas the Plan is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 and the undersigned fiduciary (hereinafter referred to as the "Fiduciary") of the Plan hereby retains GREAT-WEST to provide services for the Plan in accordance with the following terms and conditions:

Article I – Definitions

In this Agreement unless otherwise specifically provided:

(1) "Dependent" and "Employee" mean dependent and employee as defined by the Plan;

(2) Anniversary Date, Agreement Months and Agreement Years shall be calculated from JANUARY 1, 1990; JANUARY 1 of any year shall be known as the Anniversary Date;

(3) "Agreement Year" means that period of 12 consecutive months which begins on the Anniversary Date.

Article II – Administrative Services and Fees

GREAT-WEST agrees to perform such services involving the performance of non-discretionary duties as are specified in the Schedule of Services marked Schedule "A", which is attached hereto and forms part of this Agreement in accordance with the terms and conditions of this Agreement.

To facilitate the performance of such duties:

(1) GREAT-WEST has established a Central Disbursement Account with the Colorado National Bank, Denver, Colorado (CNB); and

(2) the Contractholder has advised its bank that CNB is authorized to demand moneys payable to GREAT-WEST by the Contractholder for checks cashed for benefit payments made by GREAT-WEST under the Plan. CNB is authorized to do this through the Central Disbursement Account established by GREAT-WEST; and

(3) GREAT-WEST will advise CNB of the amounts which are to be withdrawn from the Contractholder's designated bank account. The Contractholder agrees to maintain funds in such account which are adequate to cover benefit payments made by GREAT-WEST under the Plan.

The Contractholder and Fiduciary agree to pay GREAT-WEST the fees specified in the Schedule of Fees marked Schedule "B" which is attached hereto and forms part of this Agreement as reasonable compensation for services necessary for the Plan's operation. The Contractholder and Fiduciary shall be jointly and severally liable for the payment of such fees. Such fees shall be paid as described in the attached Schedule B. A grace period of 30 days shall be granted for each payment of fees falling due after the first payment during which period this Agreement shall remain in force. If any payment is not made within the days of grace, this Agreement shall automatically terminate. If this Agreement terminates for any reason, the Contractholder and Fiduciary shall be liable for all payments due and unpaid, including a pro-rata payment

for any time this Agreement is in force during the grace period.

Note: A Float Amount, as shown in Schedule B, will be payable by the Contractholder to GREAT-WEST with the first payment. GREAT-WEST will annually determine adjustments to the Float Amount. Such adjustments are to be paid within 31 days after the beginning of each Agreement Year. The Float Amount will be credited to the Contractholder after the date of termination of this Agreement.

Article III – Furnishing of Information; Access to Records

The Contractholder and Fiduciary shall furnish GREAT-WEST, on request, with correct and complete information required by GREAT-WEST to provide the services which GREAT-WEST has agreed to perform under this Agreement, including, but not limited to, a copy of the Plan and any amendments thereto. The information shall be furnished at the times and in such manner as GREAT-WEST may request. GREAT-WEST shall assume that all such information is complete and accurate and shall be under no duty to question the accuracy of such information. The files and other records of GREAT-WEST with respect to the Plan shall be the property of GREAT-WEST. GREAT-WEST, at its discretion, may charge additional fees for its services where information is not furnished, is incomplete or inaccurate or is not furnished at the time or in the manner as requested. The Contractholder agrees to give GREAT-WEST the right to inspect the records of the Contractholder which are pertinent to the operation of the Plan.

All communications sent to the Contractholder or Fiduciary from GREAT-WEST shall be transmitted to the Contractholder at the address appearing below or to such other person and address as may from time to time be designated by the Contractholder in writing. Notice transmitted to the Contractholder as aforesaid shall be considered received by the Contractholder and Fiduciary and notice sent to GREAT-WEST shall be directed to the address shown below or to such other address as GREAT-WEST may designate in writing from time to time.

Article IV – Authority to Control and Manage the Plan

The Contractholder and Fiduciary acknowledge that they have authority to control and manage the operation of the Plan. It is expressly agreed that under no circumstances shall GREAT-WEST be designated as plan administrator or a fiduciary of the Plan. Nothing herein shall be deemed to constitute GREAT-WEST a party to the Plan or to confer upon GREAT-WEST any authority or control respecting management of the Plan, authority or responsibility in connection with administration of the Plan or responsibility for the terms or validity of the Plan. GREAT-WEST shall not be responsible for any tax liability which may be imposed upon the Contractholder, any fiduciary or any Employee or Dependent under the Plan. The Contractholder and Fiduciary further agree that nothing herein shall be deemed to impose upon GREAT-WEST any obligation to any Employee or Dependent under the Plan.

Article V – Indemnification and Limitation of Liability

The Contractholder and Fiduciary shall indemnify, protect and hold GREAT-WEST harmless from any loss, liability, claim or expense (including attorneys' fees, court costs and expenses of litigation) arising out of any act or omission of the Contractholder or Fiduciary in connection with the Plan. Any premium or other tax assessed against GREAT-WEST in respect of the Plan, including any accrued interest and penalties levied on such tax, shall be borne by the Contractholder.

GREAT-WEST hereby agrees to reimburse the Contractholder and hold the Contractholder harmless in the case of a default by a representative of GREAT-WEST against the designated account of the Contractholder.

In no event shall incorrect determination of any benefit be the responsibility of GREAT-WEST.

Article VI – Agreement Termination

This Agreement may be terminated at any time by either the Contractholder and Fiduciary or GREAT-WEST provided written notice of such termination is given at least 31 days in advance. In addition, GREAT-WEST may terminate this Agreement immediately upon:

(1) amendment of the Plan in a manner deemed unsatisfactory by GREAT-WEST, provided that GREAT-WEST provides 31 days' written notice of such termination to the Contractholder.

(2) failure of the Contractholder to comply with any term or condition of this Agreement such as but not limited to failure to honor demands for fund by GREAT-WEST and/or CNB.

In the event of termination of this Agreement, GREAT-WEST shall have the right to stop processing claims immediately on the effective date of such termination. Complete information regarding all outstanding claims which are unpaid or received after such date shall be returned by GREAT-WEST to the Contractholder. In addition, GREAT-WEST shall have the right to notify each Employee covered under the Plan of such termination. To facilitate such notification the Contractholder shall, upon request, provide GREAT-WEST with a list of the name and home address of each Employee concerned. Such information must be provided to GREAT-WEST within 31 days after termination of this Agreement.

Article VII – Amendment of Schedule of Fees

GREAT-WEST has the right to revise the Schedule of Fees:

(1) when the Plan is amended, and

(2) after the first anniversary of the Effective Date of this Agreement but not more than once in any 12 month period, and

(3) when the services described in the Schedule of Services are changed.

Article VIII – Entire Agreement

This instrument contains the entire Agreement between the parties and sets forth in full the services to be rendered by GREAT-WEST. It may only be modified or amended by written agreement of the parties hereto and any representation or statement not expressly set forth

hereunder shall not be binding on any party hereto in any respect.

EARTH SYSTEMS, INC.
1900 EMBARCADERO ROAD
SUITE 207
PALO ALTO, CALIFORNIA 94303

By /s/ [Illegible] Treasurer 2/27/90
Signature Title Date

[Illegible] Plan Administrator 2/27/90
Fiduciary Signature Title Date

2275 E. Bayshore Rd. Palo Alto CA 94303
Mailing Address of Fiduciary

THE GREAT-WEST LIFE ASSURANCE COMPANY

By /s/ [Illegible] Asst. Mgr., 1/19/90
Signature Title Date

Tower 1, Great-West Life Center
8505 E. Orchard Road
Englewood, CO 80111

SERVICES AGREEMENT
SCHEDULE A – SCHEDULE OF SERVICES

The following services will be provided for the administration of the Contractholder's Plan.

Drafting Assistance
– Booklet
– Booklet Amendments
Standard Allowance for Booklet printing
I.D. Card Preparation
Standard Allowance for I.D. Card printing
Preparation of enrollment procedures
Assistance in plan enrollment
Late applicant underwriting
Claim form preparation
Standard Allowance for Claim form printing
Check preparation
Standard Allowance for Check printing
Benefit determination in accordance with the Plan
Benefit payments in accordance with the Plan
Claims Reports:
– Monthly detail list of plan payments
– Monthly summary by benefit type
– Run-off studies
Bank Reconciliation listing
Preparation of Physician payment reports
Actuarial cost estimates:
– Open and Unreported claims liabilities
– Review of Past Experience
– Projection of future cost
– Legislated changes in benefits
– Plan modifications

Expenses incurred by Great-West Life for services not covered or for covered services beyond standard allowances will be charged as incurred.

GREAT-WEST LIFE ASSURANCE COMPANY

/s/ [Illegible]
Authorized Signature

EARTH SYSTEMS, INC.

/s/ [Illegible], Treasurer
Authorized Signature

THE GREAT-WEST LIFE ASSURANCE COMPANY
US HEADQUARTERS
ENGLEWOOD COLORADO

APPLICATION FOR GROUP CONTRACT

EARTH SYSTEMS, INC.

(the Applicant) hereby applies to The Great-West Life Assurance Company for **Group Contract No. 39004GSL** in the form attached hereto. This Group Contract has been approved and its terms accepted by the Applicant.

Dated at Palo Alto, CA this 27th day of February

EARTH SYSTEMS, INC.

/s/ [Illegible]
Witness

BY /s/ [Illegible]

Treasurer
Title

/s/ [Illegible]
Licensed Resident Agent

STOP-LOSS CONTRACT

THE GREAT-WEST LIFE ASSURANCE COMPANY (herein called Great-West) in consideration of the application of

EARTH SYSTEMS, INC.
(herein called the Contractholder)

and in consideration of the payment of premiums as herein provided, hereby agrees to pay to the Contractholder the benefits as provided herein.

This contract shall be effective from **JANUARY 1, 1990** (herein called the Effective Date).

This contract is not in lieu of and does not affect any requirement for coverage by Workers' Compensation insurance.

All provisions set forth on the following pages form a part of this contract as fully as if the same were stated over the signatures hereto.

IN WITNESS WHEREOF the Company has caused this contract to be executed at its U.S. Headquarters.

/s/ [Illegible]
Senior Vice-President and Secretary

/s/ K.P. Kavanagh
President

/s/ [Illegible]
For the Actuary

Group Health Insurance
GSL-M1

Contract Form No. GSL-M184

Group Contract No. 39004GSL

ARTICLE 1 – Definitions

(1) "Plan" means that portion of the Contractholder's employee health benefit plan which is

(A) administered by Great-West; and

(B) referred to in section (5) of this Article 1 as "Coverages" provided under the Plan and covered by this contract; and

(C) in effect on the Effective Date of this contract

Any amendments accepted by Great-West which are made to the Plan from time to time while this contract is in effect are also included.

(2) "Dependent" and "Employee" and "Employee Class" are as defined in the Plan.

(3) "Contract Year" is any period of 1 year beginning on an anniversary of the Effective Date, except that the last Contract Year will end upon termination of this contract. If on the date of termination of this contact the Terminal Attachment Factor shown in Schedule "A" is other than "Not Applicable", then the last Contract Year will also include any months after termination of this contract in which there are any Benefit Payments.

(4) "Contract Months" are consecutive periods of 1 month, except that the last Contract Month terminates at the end of the last Contract Year. The first Contract Month begins on the Effective Date.

(5) "Coverages" provided under the Plan and covered by this contract are:

Hospital and Medical Coverage
Dentalcare Coverage

(6) "Exposure" for a Coverage and Contract Month and Employee Class is the number of Employees

in that Employee Class having that Coverage under the Plan during the third prior Contract Month. For the first four Contract Months, Exposure for a Coverage and Employee Class is the number of Employees having that coverage under the Plan during the first Contract Month.

Note: The term "Employees" as used in this definition shall include Employees and/or eligible Dependents whose coverage under the Plan is being continued under the COBRA HEALTH CONTINUATION provision which forms a part of the Plan.

(7) "Monthly Attachment Factor" for a Coverage is as shown in Schedule "A"

(8) "Terminal Attachment Factor" for a Coverage is as shown in Schedule "A"

(9) "Aggregate Limitation Factor" is as shown in Section "A"

(10) "Premium Factor" for a Coverage is as shown in Schedule "A"

(11) "Monthly Attachment Level" means

(A) for a Contract Month prior to termination of this contract, the sum for all Coverages and Employee Classes of the product of the Monthly Attachment Factor multiplied by the Exposure.

(B) for the first three Contract Months after termination of this contract, the sum for all Coverages and Employee Classes of the product of the Terminal Attachment Factor multiplied by the Exposure.

(C) for any other Contract Month, not applicable

(12) "Cumulative Attachment Level" for a Contract Month in a Contract Year is the sum of the Monthly Attachment Level for the Contract Month and the Monthly Attachment Levels for all previous Contract Months in the Contract Year.

(13) "Specific Stop Loss Level" is as shown in Schedule "A"

(14) "Benefit Payments" for a Contract Month means the sum of the amounts of all checks paid as benefits for expenses incurred after the effective date of this contract under the Plan during the Contract Month, less any benefits paid by Great-West to the Contractholder pursuant to Article 2 of this contract. Checks are considered paid when presented for payment at a bank designated by Great-West.

(15) "Specific Loss" is calculated each Contract Year for each Employee and each Dependent. It is the sum of the checks issued as benefits for expenses incurred after the Effective Date of this contract under the Hospital and Medical Coverage of the Plan for all Contract Months prior to termination of this contract in the Contract Year with respect to the Employee or Dependent.

(16) "Accumulated Benefit Payments" for a Contract Month in a Contract Year means the sum of Benefit Payments for the Contract Month and the Benefit Payments for all previous Contract Months in the Contract Year.

(17) "Experience Deficit" for the first Contract Month means any aggregate stop loss benefits paid by Great-West to the Contractholder pursuant to Article 3 of this Contract for the first Contract Month. For any succeeding Contract Month, "Experience

Deficit" means the excess of the sum of (A) and (B) over (C) where

(A) is the Experience Deficit for the previous Contract Month,

(B) is any aggregate stop loss benefits paid by Great-West to the Contractholder pursuant to Article 3 for the Contract Month and

(C) is any reimbursement made by the Contractholder to Great-West pursuant to Article 3 for the Contract Month,

except that in no event will the Experience Deficit for the last Contract Month in any Contract Year exceed the sum of (D) and (E) where:

(D) is the Experience Deficit for the last Contract Month of the previous Contract Year; and

(E) is the product of the Aggregate Limitation Factor and the Cumulative Attachment Level for the Contract Year.

ARTICLE 2 – Specific Stop Loss Benefit

For each Employee and each Dependent, Great-West will pay the Contractholder a benefit equal to the excess, if any, of the Specific Loss for the Contract Year over the Specific Stop Loss Level.

Article 3 – Aggregate Stop Loss Benefit

(1) For each Contract Month in a Contract Year, Great-West will pay the Contractholder a benefit equal to the excess if any of the sum of (A) and (B) over the sum of (C) and (D) where:

(A) is the Accumulated Benefit Payments for the Contract Month;

(B) is the sum of any reimbursements made by the Contractholder to Great-West pursuant to section 2 of this Article 3 for any prior Contract Months in the Contract Year;

(C) is the Cumulative Attachment Level for the Contract Month; and

(D) is the sum of any aggregate stop loss benefits paid by Great-West to the contractholder pursuant to this Article 3 for any prior Contract Months in the Contract Year.

This payment will be made after the end of each Contract Month.

(2) At the end of every Contract Month in a Contract Year, the Contractholder will reimburse Great-West for the lesser of (A) and (B), where,

(A) is the Experience Deficit for the previous Contract Month;

(B) is the excess if any of (a) over (b), where

(a) is the Monthly Attachment Level for the Contract Month; and

(b) is the Benefit Payments for the Contract Month

ARTICLE 4 – Premiums

The premium to each Contract Month prior to termination of this contract is equal to the sum for all Coverages and Employee Classes under the Plan of the product of the Premium Factor multiplied by the number of Employees covered during that Contract Month.

The premium for the first Contract Month following termination of this Contract is equal to the sum for all Coverages and Employee Classes under the Plan of the product of the Terminal Premium Factor shown in Schedule "A" multiplied by the number of Employees covered during the last month prior to termination of this contract.

There will be an additional premium each month with respect to each Employee or Dependent issued medical insurance under section (2) of Article 9 during the month. These premiums will be determined by Great-West.

A grace period of 31 days shall be granted for the payment of each premium falling due after the first premium, during which period this contract shall remain in force. If any premium is not paid within the grace period this contract shall automatically terminate. If this contract terminates for any reason, the Contractholder shall be liable for all premiums due and unpaid, including a pro rata premium for any time this contract is in force during the grace period.

ARTICLE 5 – Administration of the Plan, Access to Information

Great-West will make payments for the benefits provided under the terms of the Plan. In no event will the amounts paid for investigation of or defense against claims be included in determining the Specific Loss and Accumulated Benefit Payments for a Contract Year.

The Contractholder or his agent shall furnish monthly to Great-West the Exposure for such Contract Month.

Great-West shall have the right to inspect the records of either the Contractholder or his agent which are pertinent to the operation of the Plan or which are pertinent to determination of the Exposure or the amount of the Specific Loss or the Accumulated Benefit Payments.

ARTICLE 6 – Amendments and Alterations

(1) Unless otherwise indicated the factors shown in Schedule "A" are for the first Contract Year.

(2) After the end of the first Contract Year, Great-West may change the factors shown in Schedule "A" on any premium due date, but not more frequently than once in each Contract Year except as provided in (3) below.

(3) A change in factors can be made at any time during the first or subsequent Contract Years

(A) if the coverage provided under the Contractholder's Plan is changed; or

(B) if the provisions of the Contractholder's Plan have to be changed because of a change in law; or

(C) if there is a change in the number of Employees covered under the Contractholder's Plan which exceeds

(a) 10% in any Contract Month, or

(b) 25% over any period of 3 consecutive Contract Months; or

(D) upon addition or deletion of coverage for subsidiary or affiliated companies or corporate divisions

ARTICLE 7 – Contract Termination

This contract may be terminated by either the Contractholder or Great-West by providing 31 days' notice of such termination to the other party.

In addition, Great-West may terminate this contract immediately upon,

(1) termination of the Services Agreement between Great-West and the Contractholder; or

(2) failure of the Contractholder to comply with any term or condition of this contract.

If any state or other jurisdiction enacts or amends a law or regulation which, in the opinion of Great-West prohibits the continuance of this contract, the contract shall terminate in respect of that jurisdiction. Termination of the contract shall take place on the effective date of the law, regulation or amendment as determined by Great-West.

ARTICLE 8 – Parties to the Contract

The parties to this contract shall be the Contractholder and Great-West. This contract shall not create any rights or obligations whatsoever on the part of Great-West with respect to the persons covered under the Plan, or their beneficiaries.

ARTICLE 9 – Miscellaneous

(1) The Contractholder agrees to indemnify Great-West and hold Great-West harmless against any premium tax or other tax assessed against Great-West in respect of Plan benefits.

(2) A covered Employee or Dependent under age 65 whose medical Coverage under the Plan ends due to:

(A) termination of employment;

(B) termination of employment in an eligible class;

(C) change in marital status (in the case of a Dependent);

(D) attainment of the limiting age specified in the Plan (in the case of a Dependent child); or

(E) death of the Employee (in the case of a Dependent).

will be entitled to purchase medical insurance from Great-West. This medical insurance is referred to as Health Conversion Coverage. If such covered Employee has Dependents who are also covered under the Plan, the Health Conversion Coverage may also cover such Dependents.

Issuance of the Health Conversion Coverage will be subject to all of the following conditions:

(A) No evidence of insurability is required.

(B) The Employee or Dependent is not eligible for Medicare.

(C) The Employee or Dependent is not covered by or eligible for similar benefits, as a result of termination of his medical coverage, under any policy, contract, or other arrangement for group insurance benefits or services.

(D) Written application and the first premium for the Health Conversion Coverage must be delivered or mailed to Great-West at its home office within 31 days after the date on which

the covered Employee or Dependent's medical coverage under the Plan terminates.

(E) The Health Conversion Coverage provides coverage customarily issued by Great-West at the then current rates. Benefits provided under the Health Conversion Coverage are not the same as those provided by the Plan.

(F) The Health Conversion Coverage is effective on the next day after the date on which coverage under the Plan ceases.

STOP-LOSS CONTRACT
SCHEDULE A

The Level and Factor shown below apply to all Employees in all Employee Classes

Specific Stop Loss Level	$25,000.00
Aggregate Limitation Factor	10.00%

The Coverages and Factors applicable to each Employee Class are shown below:

Employee Class	Coverages	Factors
ALL NON-COLLECTIVE BARGAINING EMPLOYEES	Monthly Attachment Factor for All Coverages:	$192.77
	Terminal Attachment Factor for All Coverages:	$285.47
	Premium Factor for All Coverages:	$44.34
	Terminal Premium Factor for All Coverages:	$42.40

NOTE: As used herein, "Dependent Unit" means all covered Dependents of a Covered Employee.

Notwithstanding anything to the contrary expressed or implied herein, Great-West shall have the sole right to make claims under the Right of Recovery Provision contained in the Plan. In its sole discretion Great-West may litigate, negotiate, settle, compromise, release or waive any such claim. The Contractholder hereby assigns to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive any such claim.

Action taken under the Right of Recovery Provision contained in the Plan may result in the incurral of legal expenses. Such legal expenses will be borne by Great-West and the Contractholder in the same proportion as any money recovered under the Right of Recovery Provision is distributed between Great-West and the Contractholder. If no money is recovered, the legal expenses will be borne by Great-West and the Contractholder in the same proportion that each party's share of claims paid bears to the total amount of claims paid.

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 97-3745 JMI (JGx)

[Caption Omitted In Printing]

Attached to and forming part of
Group Contract No. 39004GSL
issued by
THE GREAT-WEST LIFE ASSURANCE COMPANY

to
EARTH SYSTEMS, INC.

This Contract is hereby amended as of JANUARY 1, 1991

(1) by deleting items (6) and (11) of ARTICLE 1 – Definitions and substituting the following:

(6) "Exposure" for a Coverage and Contract Month and Employee Class is the number of Employees in that Employee Class having that Coverage under the Plan during the second prior Contract Month. **NOTE:** The term "Employees" as used in this definition shall include Employees and/or eligible Dependents whose coverage under the Booklet/Certificate is being continued under the COBRA HEAI TH CONTINUATION provision which forms a part of the Booklet/Certificate.

(11) "Monthly Attachment Level" means:

(a) for a Contract Month prior to termination of this contract, the sum for all Coverages and Employee Classes of the product of the Monthly Attachment Factor multiplied by the Exposure.

(b) for the first two Contract Months after termination of this contract, the sum for all

Coverages and Employee Classes of the product of the Terminal Attachment Factor multiplied by the Exposure.

(c) for any other Contract Month, not applicable.

(2) by deleting SCHEDULE A and replacing it with the attached SCHEDULE A.

Dated at Englewood, Colorado this 21st day of March, 1991.

THE GREAT-WEST LIFE ASSURANCE COMPANY

/s/ D. C. [Illegible]
Senior Vice-President,
General Counsel and
Secretary

/s/ K P Kavanagh
President

/s/ L [Illegible]
For the Actuary

Accepted and attached to the Contract by EARTH SYSTEMS, INC. this 20th day of May, 1991.

BY /s/ [Illegible]
TITLE Trustee

STOP-LOSS CONTRACT
SCHEDULE A

The Level and Factor shown below apply to all Employees in all Employee Classes:

Specific Stop Loss Level	$75,000.00
Aggregate Limitation Factor	10.00%

The Coverages and Factors applicable to each Employee Class are shown below:

Employee Class	Coverages	Factors
ALL EMPLOYEES	Monthly Attachment Factor for All Coverages:	$364.73
	Terminal Attachment Factor for All Coverages:	$733.10
	Premium Factor for All Coverages:	$44.34
	Terminal Premium Factor for All Coverages:	$72.59

Notwithstanding anything to the contrary expressed or implied herein, Great-West shall have the sole right to make claims under the right of Recovery Provision contained in the Plan. In its sole discretion Great-West may litigate, negotiate, settle, compromise, release or waive any such claim. The Contractholder hereby assigns to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive any such claim.

Action taken under the Right of Recovery Provision contained in the Plan may result in the incurral of legal expenses. Such legal expenses will be borne by Great-West and the Contractholder in the same proportion as any money recovered under the Right of Recovery Provision is distributed between Great-West and the Contractholder. If no money is recovered, the legal expenses will be borne by Great-West and the Contractholder in the same proportion that each party's share of claims paid bears to the total amount of claims paid.

All money recovered by Great-West under the Right of Recovery Provision will be distributed as follows:

(1) first, to Great-West to be applied to reduce Great-West's payments of Specific Stop Loss Benefits to the Contractholder pursuant to Article 2 of this Contract;

(2) secondly, to Great-West to be applied to reduce Great-West's payments of aggregate stop loss benefits to the Contractholder pursuant to Article 3 of this Contract; and

(3) thirdly, to the Contractholder.

All money recovered will be applied to the accounting for the Contract Year in which the claim giving rise to subrogation was paid. If claim expenses were paid in more than one Contract Year, the money will be applied on a pro rata basis in accordance with the amount of claim expenses paid in each of the Contract Years.

The Contractholder hereby assigns to Great-West any and all rights the Contractholder, as Employer, may have under the Right of Recovery Provision contained in the Plan.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV 97-3745 JMI (JGx)
[Caption Omitted In Printing]

Attached to and forming part of
Group Contract No. 39004GSL

issued by
THE GREAT-WEST LIFE ASSURANCE COMPANY

to
EARTH SYSTEMS, INC.

This Contract is hereby amended as of AUGUST 1, 1991 by deleting SCHEDULE A and replacing it with the attached SCHEDULE A.

Dated at Englewood, Colorado this 29th day of August, 1991.

THE GREAT-WEST LIFE ASSURANCE COMPANY

/s/ D. C. [Illegible]
Senior Vice-President,
General Counsel and
Secretary

/s/ K P Kavanagh
President

/s/ [Illegible]
For the Actuary

Accepted and attached to the Contract by EARTH SYSTEMS, INC. this 16th day of September, 1991.

BY /s/ [Illegible]
TITLE VICE PRESIDENT

STOP-LOSS CONTRACT
SCHEDULE A

The Level and Factor shown below apply to all Employees in all Employee Classes:

Specific Stop Loss Level	$75,000.00
Aggregate Limitation Factor	10.00%

The Coverages and Factors applicable to each Employee Class are shown below:

Employee Class	Coverages	Factors
EMPLOYEES COVERED UNDER THE GREAT-WEST CARE PLAN	Monthly Attachment Factor for All Coverages:	$364.73
	Terminal Attachment Factor for All Coverages:	$733.10
	Premium Factor for All Coverages:	$44.34
	Terminal Premium Factor for All Coverages:	$72.59
EMPLOYEES COVERED UNDER THE GREAT-WEST CARE EXCLUSIVE PLAN	Monthly Attachment Factor for All Coverages:	$305.64
	Terminal Attachment Factor for All Coverages:	$614.34

Premium Factor for All Coverages:	$38.33
Terminal Premium Factor for All Coverages:	$60.83

Notwithstanding anything to the contrary expressed or implied herein, Great-West shall have the sole right to make claims under the Right of Recovery Provision contained in the Plan. In its sole discretion Great-West may litigate, negotiate, settle, compromise, release or waive any such claim. The Contractholder hereby assigns to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive any such claim.

Action taken under the Right of Recovery Provision contained in the Plan may result in the incurral of legal expenses. Such legal expenses will be borne by Great-West and the Contractholder in the same proportion as any money recovered under the Right of Recovery Provision is distributed between Great-West and the Contractholder. If no money is recovered, the legal expenses will be borne by Great-West and the Contractholder in the same proportion that each party's share of claims paid bears to the total amount of claims paid.

All money recovered by Great-West under the Right of Recovery Provision will be distributed as follows:

(1) first, to Great-West to be applied to reduce Great-West's payments of Specific Stop Loss Benefits to the Contractholder pursuant to Article 2 of this Contract;

(2) secondly, to Great-West to be applied to reduce Great-West's payments of aggregate stop loss benefits to the Contractholder pursuant to Article 3 of this Contract; and

(3) thirdly, to the Contractholder.

All money recovered will be applied to the accounting for the Contract Year in which the claim giving rise to right of recovery was paid. If claim expenses were paid in more than one Contract Year, the money will be applied on a pro rata basis in accordance with the amount of claim expenses paid in each of the Contract Years.

The Contractholder hereby assigns to Great-West any and all rights the Contractholder, as Employer, may have under the Right of Recovery Provision contained in the Plan.

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 97-3745 JMI (JGx)

[Caption Omitted In Printing]

EARTH SYSTEMS, INC.

SUMMARY PLAN DESCRIPTION

EXCERPT OF SUMMARY PLAN DESCRIPTION

JANUARY 1, 1992 IV-4 HOW TO FILE CLAIMS

CO-ORDINATION OF BENEFITS (COB)

The COB provision is designed to correct overcoverage which occurs when a person has health coverage for the same expenses under two or more of the plans listed below. Should this type of duplication occur, the benefits under this Plan will be co-ordinated with those of the other plans so that, the total benefits from all plans will not exceed the expenses actually incurred.

The benefits provided by the plans listed below are considered in determining duplication of coverage:

- This Plan;
- Any other group insurance or prepayment plan, Health Maintenance Organizations (HMOs); Blue Cross/Blue Shield;
- Any labor-management trusteed plan, union welfare plan, employer organization plan or employee benefit organization plan;
- Any government plan or statute providing benefits for which COB is not prohibited by law.

ORDER OF BENEFIT DETERMINATION

Certain rules are used to determine which of the plans will pay benefits first. This is done by using the first of the following rules which applies:

- A plan with no COB provision will determine its benefits before a plan with a COB provision.
- A plan that covers a person other than as a **Dependent** will determine its benefits before a plan that covers such person as a **Dependent.**
- When a claim is made for a **Dependent** child who is covered by more than one plan:
  - the benefits of the plan of the parent whose birthday falls earlier in a year will be determined before the benefits of the plan of the parent whose birthday falls later in that year; but
  - if both parents have the same birthday, the benefits of the plan which covered the parent longer will be determined before [IV-5] those of the plan which covered the other parent for a shorter period of time.

This method of determining the order of benefits will be referred to as the "Birthday Rule". The Birthday Rule will be used to determine the order of benefits for **Dependent** children in all cases except those described below.

- If the other plan does not have the Birthday Rule, then the plan which covers the child as a **Department** of the male parent will pay its benefits first.
- If the parents are legally separated or divorced, benefits for the child will be determined in this order:

- first, the plan of the parent with custody of the child will pay its benefits;
- then, the plan of the spouse of the parent with custody of the child will pay its benefits; and
- finally, the plan of the parent not having custody of the child will pay its benefits.

However, if there is a court decree stating which parent is responsible for the health care expenses of the child, then a plan covering the child as a **Dependent** of that parent will determine its benefits before any other plan.

- A plan that covers a person as:
  - a laid-off **Employee**; or
  - a **Retired Employee**; or
  - a **Dependent** of such **Employee**;

  will determine its benefits **after** the plan that does not cover such person as:
  - a laid-off **Employee**; or
  - a **Retired Employee**; or
  - a **Dependent** of such **Employee**.

  If one of the plans does not have this rule, and if, as a result, the plans do not agree on the order of benefits, this rule will not apply.

[IV-6] • If none of the above rules establishes the order of payment, a plan under which the person has been covered for the longer time will determine its benefits before a plan covering that person for a shorter time.

Two successive plans of the same group will be considered one plan if the person was eligible for

coverage under the new plan within 24 hours after the old plan terminated. A change in the amount or scope of benefits, or a change in the carrier, or a change from one type of plan to another (e.g. single employer plan to multiple employer plan) **will not** constitute the start of a new plan.

When the COB provision reduces the benefits payable under this Plan:

- each benefit will be reduced proportionately; and
- only the reduced amount will be charged against any benefit limits under this Plan.

The COB provision is applied throughout the calendar year. If there is any reduction of the benefits provided under a specific Benefit Provision of this Plan because of duplicate coverage, similar benefits may be payable later in that year if more Allowable Expenses are incurred under the same Benefit Provision. "Allowable Expense" means any necessary, **Usual and Customary** item of expense at least part of which is covered under at least one of the plans covering the person for whom claim is made or service provided. In no event will Allowable Expense include the difference between the cost of a private hospital room and a semi-private hospital room unless the patient's stay in a private hospital room is **Medically Necessary**.

Benefits under a governmental plan will be taken into consideration without expanding the definition of "Allowable Expense" beyond the hospital, medical and surgical benefits as may be provided by such governmental plan.

When a plan provides benefits in the form of services rather than cash payments, the reasonable cash value of each service rendered will be deemed to be both an Allowable Expense and a benefit paid.

[IV-7] PROVISION FOR RIGHT OF RECOVERY

A third party may be liable or legally responsible for expenses incurred by a **Covered Person** for:

- an illness; or
- a sickness; or
- a bodily injury.

When this happens we will, subject to all other terms and provisions of this **Booklet**, pay any benefits which are payable for the expenses incurred by the **Covered Person** for the treatment of such illness, sickness or bodily injury (the Loss).

RIGHT OF RECOVERY

We will, at our sole option, have the right to recover from the **Covered Person** any payment for benefits paid for treatment of such Loss under this **Booklet** which the **Covered Person** is entitled to receive from the third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, that the **Covered Person** receives from:

- the third party; or
- the third party's insurer or guarantor; or
- the **Covered Person's** uninsured motorist insurance.

This lien will not exceed:

- the amount of benefits paid under this **Booklet** for the treatment of the Loss; or
- the amount received by the **Covered Person** for such medical treatment from the third party.

[IV-8] CONDITIONS

- The **Covered Person** must cooperate fully with us in asserting our right to recover. If the **Covered Person**:
  - makes any recovery as set forth in this provision; and
  - fails to reimburse us fully for any benefits paid under this provision;

  then he will be personally liable to us to the extent of such recovery up to the amount of the first lien.
- Before any benefits are paid for treatment of such Loss under this **Booklet**, we may require the **Covered Person** to provide all information and sign and return all documents necessary to exercise our rights under this provision.

DENIAL OF CLAIM

NOTICE OF DENIAL OF CLAIM

If any benefits are denied, either in whole or in part, notification of the specific reason or reasons for the denial will be given along with reference to the pertinent plan provisions on which the denial is based. Guidance as to the additional material or information required to perfect the claim will also be given.

Notice of any decision denying the claim must be furnished within 90 days after the claim is filed. If special circumstances require an extension of time to act on the claim, another 90 days will be allowed. If such an extension is required, notification will be given by the Plan Administor before the end of the initial 90-day period. If the claim is not processed or a notice is not given within these time periods, the claim will be deemed to have been denied for the purpose of proceeding to the claim review procedure described below.

[IV-9] APPEAL OF A CLAIM DENIAL

If there are any questions about a claim payment, the Plan Administrator should be contacted. If it is desired to initiate a claim review procedure because there is disagreement with the reasons why the claim was denied, the Plan Administrator should be notified in writing within 60 days after receipt of the written claim denial. A request for a review of the claim and examination of any pertinent documents may be made by the claimant or anyone authorized to act on his or her behalf. The reasons why it is believed that the claim should not have been denied, as well as any data, questions or appropriate comments, should be submitted in writing.

DECISION ON REVIEW

Notification of the final decision will be given 60 days after receipt of a request for review unless special circumstances, such as a Peer Review Board review of the claim, require an extension of time for processing, in which event a further 60 days will be allowed.

[IV-10] ERISA GENERAL INFORMATION

- Name of Plan:

  Health and Welfare Plan for **Employees** of EARTH SYSTEMS, INC.,

- Policyholder/**Employer**:

  EARTH SYSTEMS, INC.
  5880 W. LAS POSITAS BLVD.
  SUITE 52
  PLEASANTON, CALIFORNIA 94588

- Employer Identification Number (EIN) assigned to the Plan Sponsor by IRS:

  94-2742060

  Plan number assigned by the Plan Sponsor/**Employer**:

  501

- Type of Plan:

  Life Insurance
  Accidental Death, Dismemberment and Loss of Sight Insurance
  Hospital Benefits
  Medical Benefits
  Dentalcare Benefits
  Prescription Drug Benefits
  Flexible Benefits Account

- Funding:

  Great-West Life & Annuity Insurance Company completely funds the following benefits:

  Life Insurance
  Accidental Death, Dismemberment and Loss of Sight Insurance

[IV-11] The **Employer** completely funds the following benefits:

Hospital Benefits
Medical Benefits
Dentalcare Benefits
Prescription Drug Benefits

- Type of Administration:

  Contract Administration

- Plan Administrator:

  DENISE SHELTON
  HUMAN RESOURCES MANAGER
  EARTH SYSTEMS, INC.
  5880 W. LAS POSITAS BLVD.
  SUITE 52
  PLEASONTON, CALIFORNIA 94588
  800-870-0991

- Agent for service of legal process:

  Plan Administrator (see above)

- The eligibility requirements, termination provisions and a description of the circumstances which may result in disqualification, ineligibility, or denial or loss of any benefits are described in this **Booklet**.

- The sources of contributions to the plan:

Employee Coverages –	0% Employee	100% Employer
Dependent Coverages –	20% Employee	80% Employer
Flexible Benefits Account –	100% Employee	0% Employer

- The date of the end of the year for purposes of maintaining the plan's fiscal records:

  DECEMBER 31

- [IV-12] Claims – The procedures to be followed in presenting claims for benefits under the plan and the remedies for the redress of claims which are denied in whole or in part are described in this **Booklet**.

- Statement of ERISA Rights:

  As a participant in this plan you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

  – Examine, without charge, at the plan administrator's office and at other specified locations, such as work sites and union halls, all plan documents, including insurance contracts, collective bargaining agreements and copies of all documents filed by the plan with the U.S. Department of Labor, such as detailed annual reports and plan descriptions.

  – Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The administrator may make a reasonable charge for the copies.

  – Receive a summary of the plan's annual financial report. The plan administrator is required by law to furnish each participant with a copy of this summary annual report.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the **Employee** benefit plan. The people who operate your plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your **Employer**, your union, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a welfare

benefit or exercising your rights under ERISA. If your claim for a welfare benefit is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have the plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may [IV-13] require the plan administrator to provide the materials and pay you up to $100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. If it should happen that plan fiduciaries misuse the plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay the court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees (e.g. if it finds your claim is frivolous). If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor-Management Services Administration, Department of Labor.

RIGHTS

If **Retired Employees** are covered under the Plan described in this **Booklet**, then the term **"Employee"** will include a **Retired Employee.**

Employee Rights

Employees' rights under the plan are legally enforceable as long as **Employees** meet the eligibility requirements. **Employees** will have continued rights upon plan termination with regard to claims incurred prior to termination.

[IV-14] Employer Rights

The benefits for **Employees** are intended to be effective for an indefinite period of time. However, the **Employer** reserves the right to modify or terminate the plan at will, except with regard to claims incurred prior to modification or termination. Modification includes but is not limited to the **Employer's** right to change the nature or extent of benefits provided or his **Employees'** contributions to the Plan.

OTHER GENERAL INFORMATION

CALIFORNIA LAW REQUIRES THAT THE FOLLOWING INFORMATION BE PROVIDED TO ALL EMPLOYEES LOCATED IN CALIFORNIA.

IF YOU HAVE A COMPLAINT CONCERNING A CLAIM AND YOU HAVE BEEN UNABLE TO RESOLVE THE COMPLAINT SATISFACTORILY THROUGH CONTACT

WITH GREAT-WEST, ITS AGENTS OR REPRESENTATIVES, THEN YOU MAY SEEK ASSISTANCE BY CALLING OR WRITING TO THE CALIFORNIA DEPARTMENT OF INSURANCE AT THE ADDRESS OR TELEPHONE NUMBER SHOWN BELOW:

UNDERWRITING DIVISION
CALIFORNIA DEPARTMENT OF INSURANCE
300 SOUTH SPRING STREET,
LOS ANGELES, CA 90013

TOLL-FREE TELEPHONE NO: 1-800-927-HELP (4357)

Linda Claxton, Esq. (State Bar No. 125729)
LEWIS FISHER HENDERSON & CLAXTON, PLLC
12100 Wilshire Boulevard, Suite 600
Los Angeles, California 90025
(310) 820-3150

Thomas H. Lawrence, Esq. (TN Bar No. 017105)
LEWIS FISHER HENDERSON & CLAXTON, PLLC
5050 Poplar Avenue, Suite 1717
Memphis, Tennessee 38157
(901) 767-6160

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., Plaintiffs, v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Defendants.	Case No. CV 97-3745 JMI (JGx) DECLARATION OF LOUIS A. TUCCITTO (Honorable James M. Ideman) Date: Time: Ctrm:

I, Louis A. Tuccitto, declare as follows:

1. I am an Associate Manager in the Great-West Life & Annuity Insurance Company ("Great-West") Recovery Unit. I have personal knowledge of the facts stated herein and if called as a witness I could and would competently testify to those facts.

2. Great-West initially contacted Eric Knudson on august 19, 1992 seeking the name of he and Janette Knudson's attorney and informing them of the Plan's right to full reimbursement to the extent of benefits paid if third parties were made. A true and correct copy of correspondence sent by Great-West to Eric Knudson is attached hereto as Exhibit 1.

3. Eric Knudson responded to that letter and Great-West received the response on September 4, 1992. A true and correct copy of the handwritten note received from Eric Knudson in response to Great-West's August 19, 1992 letter is attached hereto as Exhibit 2.

4. On September 30, 1992, I sent Janette Knudson a letter advising her that Great-West, on behalf of the Plan, had a first-lien Right of Recovery to any sums paid in settlement or judgment on her behalf as a result of her accident. A true and correct copy of the letter I sent to Janette Knudson, along with the Right of Recovery Agreement and Recovery Questionnaire I enclosed are attached hereto as Exhibit 3.

5. In that correspondence, I requested that "[I]n conformance with the plan documents [that she] please complete and return the Recovery Questionnaire and Right of Recovery Agreement." *Id.*

6. Ms. Knudson was advised that "failure to respond accurately and promptly may affect future benefits." *Id.*

7. The letter also stated that if she had an attorney, this correspondence as well as its enclosures should be sent to [her] attorney immediately for completion and return. *Id.* The letter also provided information that Janette Knudson needed in order to completely and accurately fill out the RRA, such as the Plan number and the "Legaleze" number, Great-West's internal tracking number. *Id.*

8. If Eric Knudson had not signed this document, Ms. Knudson would have been violating the terms of the Plan and the Plan would not have been obligated to pay benefits on her behalf.

9. The Plan paid benefits on her behalf in consideration of Eric Knudson executing the RRA on her behalf.

10. Under the terms of the SPD, Ms. Knudson was required to "sign and return all documents necessary to exercise our rights under this provision."

11. As required by the SPD, Eric Knudson returned the completed Recovery Questionnaire and RRA to Great-West. Great-West received these documents on October 29, 1992. A true and correct copy of the completed Recovery Questionnaire and signed Right of Recovery Agreement is attached as Exhibit 4.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 1998.

/s/ Louis A. Tuccitto
Louis A. Tuccitto

Great-West LIFE & ANNUITY *INSURANCE COMPANY*

AUGUST 19, 1992

RGNL,218,052556,071,S549062458,** REPLY TO:

ERIC KNUDSON
18646 SUNBURST STREET
NORTHRIDGE CA 91324

SAN FRANCISCO
BENEFIT PAYMENTS
455 MARKET STREET
SUITE 2000
SAN FRANCISCO CA
94105
TELE. 800 685 1040

RE: EMPLOYEE: ERIC KNUDSON S549062458
PATIENT: JANETTE SP
PLAN NO.: 052556 CLAIM NO: 500

WE ARE WRITING TO INFORM YOU THAT YOUR GROUP HEALTH CONTRACT ALLOWS YOUR GROUP HEALTH PLAN TO BE A PARTY TO ANY LEGAL ACTION YOU MAY TAKE BECAUSE OF AN ACCIDENT OR INJURY.

THIS MEANS THAT IF YOU RECEIVE A SETTLEMENT OR JUDGEMENT FROM THE COURT, THE PLAN IS ENTITLED TO FULL REIMBURSEMENT FOR EXPENSES WHICH WERE PAID ON YOUR BEHALF.

IF YOU RETAIN AN ATTORNEY AS PART OF THE SETTLEMENT OR JUDGEMENT PROCESS, HE IS NOT AUTHORIZED TO REPRESENT THE GROUP HEALTH PLAN OR THIS COMPANY UNLESS HE HAS BEEN SPECIFICALLY RETAINED BY THIS COMPANY'S RECOVERY UNIT. ALSO, NO PART OF THE GROUP HEALTH PLAN'S RECOVERY WILL BE CONTRIBUTED TOWARD YOUR ATTORNEY'S LEGAL FEES.

SO THAT WE MAY MORE ACCURATELY HANDLE YOUR CLAIMS PROCESS, PLEASE PROVIDE THE FOLLOWING INFORMATION TO THIS COMPANY'S RECOVERY UNIT, 6T2, 8515 E. ORCHARD ROAD, ENGLEWOOD, CO 80111:

1. NAME AND ADDRESS OF YOUR ATTORNEY AND YOUR INSURER (OTHER THAN THIS COMPANY).
2. NAME AND ADDRESS OF THE THIRD PARTY'S ATTORNEY AND INSURER.

A COPY OF THIS LETTER AND COPIES OF CLAIMS YOU'VE SUBMITTED HAVE BEEN SENT TO OUR RECOVERY UNIT. WE WILL CONTACT YOU IF WE NEED ANY FURTHER INFORMATION.

THANK YOU IN ADVANCE FOR YOUR ATTENTION AND ASSISTANCE.

BENEFIT PAYMENTS OFFICE

021878-218

DAVID C. LEDERER

Attorney at Law

12424 Wilshire Boulevard, Suite 830
Los Angeles, California 90025

Telephone (310) 820-5012
Facsimile (310) 820-5502

[Handwritten In Original

RE: ERIC KNUDSON S549-06-2458
PATIENT: JANETTE SP
PLAN NO.: 052556 CLAIM NO: 500]

[Following Enclosed Material Was Marked "Void N/A" –
Re:

Doctor:_____
Report Number:
Other:

TO WHOM IT MAY CONCERN:

This will authorize you to release to us, the LAW OFFICES OF DAVID LEDERER, or a representative, all information, including copies or photostats or photographs of any and all medical, hospital, police, or other reports, records, x-rays, or other information, relating to the events or the injuries and/or damages sustained by the undersigned, arising out of the incident which occurred on _____ at or near _____.

_____
Signed:]

[Note Handwritten In Original]

PLEASE NOTE ABOVE ADDRESS AND PHONE OF MY "ATTORNEY OF RECORD" RE: THIS INCIDENT AND

PENDING LAWSUIT. HE HAS BEEN INFORMED OF THIS AND WILL BE HAPPY TO COOPERATE IN ANY WAY POSSIBLE.

P.S. PARDON THE INFORMALITY.

/s/ Eric Knudson

RGNL. 218, 052556, 071, S549062458

Great-West Life

[Address Omitted In Printing]

CERTIFIED/RETURN RECEIPT REQUESTED

September 30, 1992

Janette Knudson
18646 Sunburst Street
Northridge, CA 91324

Re: *Right of Recovery*
Claimant: Janette Knudson
Plan Name: Earth System
Plan #52556-071
Legaleze #073917

Dear Ms. Knudson:

The Recovery Unit has been forwarded claims information from the San Francisco Benefit Payment Office with regard to claims paid on your behalf as a result of injuries sustained on or about June 10, 1992. The Great-West Life Assurance Company on behalf of its Planholder, Earth System, Plan #52556-071, is investigating the Plan's recovery possibilities from potential sources such as the liable third party, third party insurer or other insurance.

Please be advised that The Great-West Life Assurance Company on behalf of the Plan has a first lien Right of Recovery to any sums paid in settlement or judgment on your behalf as a result of the accident. The claims information indicates that at least $9,049.00 has been paid to hospital and medical providers on your behalf as a result of the accident.

In conformance with the Plan documents please complete and return the Recovery Questionnaire and Right of

Recovery Agreement. Please provide a copy of the accident report or at least a narrative description of the accident. The Questionnaire should be completed to the best of your ability and returned along with a signed Reimbursement Agreement within 10 days from receipt of this correspondence. Failure to respond accurately and promptly may affect future benefits.

If you have retained an attorney to represent you in settlement negotiations or in litigation with regard to this matter, this correspondence as well as its enclosures should be sent to your attorney immediately for completion and return. Settlement of this matter in contravention to the above does not extinguish the Plan's rights in this matter or reduce its legal options.

Correspondence regarding this matter should be sent to the above address, Attn: Recovery Unit, 7T2. Please be sure to refer to our Legaleze #073917 in any correspondence. Direct telephone inquiries may be made at (303) 689-4290.

Sincerely,

/s/ Louis A. Tuccitto
Louis A. Tuccitto
Assistant Manager
Recovery Unit

Enclosures

bpc: San Francisco Benefit Payment Office
Referencing Employee ID #549-06-2458

Please refer to the above Legaleze #073917 on any future correspondence or submissions. Thank you!

LEGALEZE #073917

RIGHT OF RECOVERY AGREEMENT

Plan name: EARTH SYSTEMS INC. Plan number: 052556-071

Employee's name: ERIC KNUDSON Patient's name: JANETTE KNUDSON

Social Security Number: 549-06-2458 Date of the Injury: 6/10/92

As a member of the above named Plan, I have made a claim for covered medical expenses under the terms of the Plan for myself or dependent for the injury/illness as detailed above. I understand that a claim for similar expenses may be covered under other Plans, such as Auto Accident Insurance, Student Health Insurance, Workers' Compensation, or Homeowners Insurance.

I request that benefits be paid by the Plan at this time without the necessity of awaiting final determination of responsibility and with the understanding that no benefits may be payable and that another party or insurer may be liable for like benefits for which they will make payments.

In consideration for the plan paying benefits and in accordance with the terms of the Plan, I agree that the plan may be subrogated to me or my dependent's rights for any benefits from the other party. I agree to transfer to the Plan any right I or my dependents may have to take legal action against the other party. I also agree to cooperate fully with the Plan in asserting its right to subrogate and supply to the Plan any and all information. I will execute all documents reasonably necessary to carry out

its right to recover from the other party any benefits paid under the Plan which are subject to this provision.

I also understand that under the terms of the Plan, the Plan may recover from me any payment for benefits paid under this Plan for which I or my dependents may be entitled to receive from a third party. The Plan shall automatically have a first lien upon any recovery, whether by settlement, judgment or otherwise, that I or my dependents receives from another party, the other party's insurer or guarantor, or my own insurer or guarantor. Said first lien shall be for the amount of medical and hospital benefits paid by the Plan, I shall be personally liable to the Plan to the extent of such recovery up to the amount of its first lien. I agree to cooperate fully with the Plan in asserting its rights to recover.

Dated: 10/20/92 Signature: /s/ Eric Knudson
(Employee or Non-minor dependent)

RECEIVED
OCT 29 1992

RECOVERY QUESTIONNAIRE

LEGALEZE #073917

:NSURED'S NAME: ERIC KNUDSON

SSN 549-06-2458

?LAN NAME EARTH SYSTEMS INC.

?LAN NUMBER 052556-071

:OCATION OF ACCIDENT INTERSTATE – 5 (SOUTH-BOUND NEAR KETTLEMAN

?LEASE PROVIDE THE ACCIDENT REPORT OR A WRITTEN NARRATION OF HOW THE INCIDENT OCCURRED, AND THE FOLLOWING INFORMATION:

VEHICLE STEERING FAILURE – ROLLED VEHICLE

	YOU	OTHER PARTY
NAME	ERIC KNUDSON	
ADDRESS	18646 SUNBURST ST NORTHRIDGE, CA. 91324	

INSURANCE COMPANY
(other than Great-West Life or TNE)
INSURERS ADDRESS
STATE FARM INS.
31303 AGURA RD.
WESTLAKE VILLAGE, CA. 91363

ADJUSTOR'S NAME JOELLE MONTAG (818) 703-5823

POLICY NUMBER
945-1654

CLAIM NUMBER
75-2533-203

ATTORNEY
DAVID LEDERER (310) 820-5012

ATTORNEY'S ADDRESS
12424 WILSHIRE BLVD. #830

LOS ANGELES, CA. 90025

HAS LAWSUIT BEEN FILED? _____. IF YES, PLEASE STATE COURT AND ENCLOSE COPY OF COMPLAINT

_____

HAVE YOU BEGUN SETTLEMENT NEGOTIATIONS? NO. IF YES, PLEASE GIVE DETAILS. _____

P:WP50\CMF\RECOVERY.QUE

*PRODUCTS LIABILITY SUIT, IS PEND

[Proof Of Service Omitted In Printing]

Thomas L. Henderson, TN Bar No. 11526
Thomas H. Lawrence, TN Bar No. 17105
McKNIGHT HUDSON LEWIS/
FORD & HARRISON LLP
6750 Poplar Ave., Suite 301
Memphis, Tennessee 38138
(901) 756-1550

Linda Claxton Johnson, CA Bar No. 125729
FORD & HARRISON LLP
333 South Grand Avenue
Suite 3680
Los Angeles, California 90071
(213) 680-4161

Attorneys for Plaintiff
Great-West Life & Annuity Insurance Company

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, Plaintiff, v. JANETTE KNUDSON, ~~an individual~~ [AND ERIC KNUDSON] Defendant.	CASE NO 97-3745JMI (JGx) COMPLAINT (Filed May 19, 1997)

Plaintiff Great-West Life & Annuity Insurance Co. ("Great-West"), pleads as follows:

1. This action to enforce the terms of the Health and Welfare Plan for Employees of Earth Systems, Inc. (the "Plan") and for equitable relief arises under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461. Declaratory relief is also sought pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

2. Plaintiff Great-West Life & Annuity Insurance Company is the assignee for collection of the Health and Welfare Plan for Employees of Earth Systems, Inc. for the purpose of prosecuting all rights and claims for reimbursement and, as such, is authorized to bring this action within the meaning of 29 U.S.C. § 1132(a)(2) and (a)(3)(B)(ii).

3. Defendants Janette Knudson and Eric Knudson are citizens and residents of Los Angeles County, California.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132 because this action to enforce provisions of the Plan arises under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA").

5. Pursuant to 29 U.S.C. § 1132(e)(2), venue is proper in this Court because Defendants reside in this district and because the breach of Plan provisions have occurred and are occurring in this district.

FACTUAL ALLEGATIONS

6. Defendant Eric Knudson was an employee of Earth Systems, Inc. He elected to participate in the Plan for purposes of obtaining medical, surgical, and hospital benefits for himself and for his wife Janette Knudson, as such, Janette Knudson, is a "covered person" under the Health and Welfare Plan for Employees of Earth Systems, Inc. (the "Plan")

7. On or about June 10, 1992, Plaintiff was involved in an automobile accident. As a result of the accident, Plaintiff asserted a claim for personal injuries against Honda Motors of America, Inc., Galpin Motors, Inc. and Hyundai Motor Company.

8. In connection with the same injures alleged in that claim, the Plan paid medical benefits to the Plaintiffs in the amount of $411,157.11.

9. The Plan maintains an express provision for right of recovery which states:

> A third party may be liable or legally responsible for expenses incurred by a covered person for
>
> an illness; or a sickness; or a bodily injury.
>
> When this happens we will, subject to all other terms and provisions of this booklet, pay any benefits which are payable for the expenses incurred by the covered person for the treatment of such illness, sickness or bodily injury. (The loss).
>
> RIGHT OF RECOVERY. We will, at our sole option, have the right to recover from the covered person any payment for benefits paid for

treatment of such loss under this booklet which the covered person is entitled to receive from a third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, the covered person receives:

The third party;

or the third party's insurer or guarantor;

or the covered person's uninsured motorists insurance.

This lien will not exceed:

the amount of benefits paid under this booklet for the treatment of a loss;

or

the amount received by the covered person for such medical treatment from the third party.

CONDITIONS:

The covered person must cooperate fully with us in asserting our right to recover. If the covered person: – makes any recovery as set forth in this provision; and – fails to reimburse us fully for any benefits paid under this provision; then he will be personally liable to us the extent of such recovery up to the amount of the first lien.

before any benefits are paid for the treatment of such loss under this booklet, we may require the covered person to provide all information and sign and return all documents necessary to exercise our rights under this provision.

10. Defendants settled their claims for $650,000.00. Plaintiff has requested assurance that Defendants will

honor the terms of the Plan, but Defendants have failed and refused to provide such assurances.

I. INJUNCTION AGAINST ACTS AND PRACTICES THAT VIOLATE THE TERMS OF THE PLAN

11. Pursuant to 29 U.S.C. § 1132(a)(3), Plaintiff seeks an injunction against Defendants: (1) to prevent the Defendants from violating the terms of the Plan and (2) to enforce the terms of the Plan.

12. By not agreeing to reimburse the Plan the amount recovered, Defendants have violated, and therefore breached the terms of the Plan.

13. Since this act and/or practice violates the Plan's terms, this Court should enter an order enjoining Defendants and all of those persons in active concert or participation with them, from violating the Plan's terms.

14. Specifically, the Court should enjoin Defendants and all those in active concert or participation with them, to reimburse the Plan in the amount of $411,157.11 out of any proceeds they recovered from third parties.

II. DECLARATORY RELIEF

15. Pursuant to 28 U.S.C. §§ 2201, 2202, Plaintiffs request that the Court order and declare that:

A. The terms of the Plan provide for full reimbursement from Plan participants and their beneficiaries for sums paid by the Plan to the participants and/or their beneficiaries which the participant or beneficiary is able to recover from third parties;

B. Defendants are required to reimburse the Plan in the amount of $411,157.11 out of any proceeds Defendants recovered from responsible third parties.

PRAYER FOR RELIEF

Plaintiff requests that it be granted an injunction against acts and practices that violate the terms of the Plan and declaratory judgment against Defendants enforcing the terms of the Plan. Additionally, Defendants, and those acting in active concert or participation with them, should be enjoined to reimburse the Plan for the amount Defendants recovered from responsible third parties, up to $411,157.11. Plaintiff seeks an award of attorneys' fees for having to bring this action. Plaintiff also seeks prejudgment and postjudgment interest at the highest legal rate.

DATED: May 19, 1997

Respectfully submitted,

FORD & HARRISON LLP

By: /s/ Linda Claxton Johnson
Linda Claxton Johnson

McKNIGHT HUDSON LEWIS
FORD & HARRISON LLP

By: /s/ Thomas L. Henderson
Thomas L. Henderson

By: /s/ Thomas H. Lawrence
Thomas H. Lawrence

[Exhibits Omitted In Printing]

Thomas H. Lawrence, TN Bar No. 17105
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
2311 Cedar Springs Road, Suite 400
Dallas, Texas 75201-7812
(214) 220-0025

Linda Claxton Johnson, CA Bar No. 125729
FORD & HARRISON LLP
333 South Grand Avenue
Suite 3680
Los Angeles, California 90071
(213) 680-3410

Thomas L. Henderson, TN Bar No. 11526
McKNIGHT HUDSON LEWIS/
FORD & HARRISON LLP
6750 Poplar Ave., Suite 301
Memphis, Tennessee 38138

Attorneys for Plaintiffs
Great-West Life & Annuity Insurance
Company, the Health and Welfare Plan
for Employees of Earth Systems, Inc., and
Earth Systems, Inc., the Plan
Administrator for the Health and Welfare
Plan for Employees of Earth Systems, Inc.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH	))))))	CASE NO. CV 97-3745 JMI(JGx) **VERIFIED FIRST AMENDED COMPLAINT**

SYSTEMS, INC., AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC.,

Plaintiffs,

v.

JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual,

Defendants.

Plaintiffs Great-West Life & Annuity Insurance Co. ("Great-West"), the Health and Welfare Plan for Employees of Earth Systems, Inc. and Earth Systems, Inc., the Plan Administrator for the Health and Welfare Plan for Employees of Earth Systems, Inc., plead as follows:

1. This action to enforce the terms of the Health and Welfare Plan for Employees of Earth Systems, Inc. (the "Plan") and for equitable relief arises under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461. Declaratory relief is also sought pursuant to 28 U.S.C. §§ 2201 and 2202. Injunctive relief is requested pursuant to Federal Rule of Civil Procedure 65.

PARTIES

2. Plaintiff Great-West Life & Annuity Insurance Company is the assignee for collection of the Health and

Welfare Plan for Employees of Earth Systems, Inc. (the "Plan") for the purpose of prosecuting all rights and claims for reimbursement.

3. Earth Systems, Inc. is the Plan Administrator of the Plan and, as such, is authorized to bring this action within the meaning of 29 U.S.C. § 1132(a)(2) and (a)(3)(B)(ii).

4. Defendants Janette Knudson and Eric Knudson are citizens and residents of Los Angeles County, California.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132 because this action to enforce provisions of the Plan arises under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA").

6. Pursuant to 29 U.S.C. § 1132(e)(2), venue is proper in this Court because Defendants reside in this district and because the breach of Plan provisions have occurred and are occurring in this district.

FACTUAL ALLEGATIONS

7. Defendant Eric Knudson was an employee of Consultants Southern California, a wholly-owned subsidiary of Earth Systems, Inc. He elected to participate in the Plan for purposes of obtaining medical, surgical, and hospital benefits for himself and for his wife Janette

Knudson, as such, Janette Knudson, is a "covered person" under the Health and Welfare Plan for Employees of Earth Systems, Inc. (the "Plan")

8. On or about June 10, 1992, Janette Knudson was involved in an automobile accident. As a result of the accident, Janette Knudson asserted a claim for personal injuries against Honda Motors of America, Inc., Galpin Motors, Inc. and Hyundai Motor Company.

9. In connection with the same injures [sic] alleged in that claim, the Plan paid medical benefits to the Defendants in the amount of $411,157.11.

10. The Plan maintains an express provision for right of recovery which states:

A third party may be liable or legally responsible for expenses incurred by a covered person for

an illness; or a sickness; or a bodily injury.

When this happens we will, subject to all other terms and provisions of this booklet, pay any benefits which are payable for the expenses incurred by the covered person for the treatment of such illness, sickness or bodily injury. (The loss).

RIGHT OF RECOVERY. We will, at our sole option, have the right to recover from the covered person any payment for benefits paid for treatment of such loss under this booklet which the covered person is entitled to receive from a third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, the covered person receives:

The third party;

or the third party's insurer or guarantor;

or the covered person's uninsured motorists insurance.

This lien will not exceed:

the amount of benefits paid under this booklet for the treatment of a loss; or

the amount received by the covered person for such medical treatment from the third party.

CONDITIONS:

The covered person must cooperate fully with us in asserting our right to recover. If the covered person: – makes any recovery as set forth in this provision; and – fails to reimburse us fully for any benefits paid under this provision; then he will be personally liable to us [to] the extent of such recovery up to the amount of the first lien.

before any benefits are paid for the treatment of such loss under this booklet, we may require the covered person to provide all information and sign and return all documents necessary to exercise our rights under this provision.

11. Additionally, Eric Knudson signed, on behalf of Janette Knudson, a Right of Recovery Agreement wherein they agreed in pertinent part that:

I also understand that under the terms of the Plan, the Plan may recover from me any payment for benefits paid under this Plan for which I or my dependents may be entitled to receive from a third party. The Plan shall automatically have a first lien upon any recovery, whether by settlement, judgment or otherwise, that I or my

> dependents receives from another party, the other party's insurer or guarantor, or my own insurer or guarantor. Said first lien shall be for the amount of medical and hospital benefits paid by the Plan. I shall be personally liable to the Plan to the extent of such recovery up to the amount of its first lien. I agree to cooperate fully with the Plan in asserting its rights to recover.

12. Defendants settled their claims for $650,000.00. Plaintiff have [sic] requested assurance that Defendants will honor the terms of the Plan, but Defendants have failed and refused to provide such assurances.

I. INJUNCTION AGAINST ACTS AND PRACTICES THAT VIOLATE THE TERMS OF THE PLAN

13. Pursuant to 29 U.S.C. § 1132(a)(3), Plaintiffs seek an injunction against Defendants: (1) to prevent the Defendants from violating the terms of the Plan and (2) to enforce the terms of the Plan.

14. By not agreeing to reimburse the Plan the amount recovered, Defendants have violated, and therefore breached the terms of the Plan.

15. Since this act and/or practice violates the Plan's terms, this Court should enter an order enjoining Defendants and all of those persons in active concert or participation with them, from violating the Plan's terms.

16. Specifically, the Court should enjoin Defendants and all those in active concert or participation with them, to reimburse the Plan in the amount of $411,157.11 out of any proceeds they recovered from third parties.

II. DECLARATORY RELIEF

17. Pursuant to 28 U.S.C. §§ 2201, 2202, Plaintiffs request that the Court order and declare that:

A. The terms of the Plan provide for full reimbursement from Plan participants and their beneficiaries for sums paid by the Plan to the participants and/or their beneficiaries which the participant or beneficiary is able to recover from third parties;

B. Defendants are required to reimburse the Plan in the amount of $411,157.11 out of any proceeds Defendants recovered from responsible third parties.

III. TEMPORARY RESTRAINING ORDER

18. Pursuant to Fed. R. Civ. P. 65(b), Plaintiffs are entitled to a temporary restraining order, restraining Defendants from seeking state court approval of their proposed settlement until Plaintiffs' rights have been determined by this Court or from cashing any checks received, or otherwise disposing of any funds received, pursuant to settlement of their claims against Honda, Galpin, and Hyundai, because the attorney for Defendants has represented to counsel for Plaintiffs that he and Defendants will seek to obtain state court approval of their plan to deny the Plaintiffs their right of reimbursement and disburse the tendered funds to Defendants despite Plaintiffs' rights.

19. Plaintiffs will be irreparably harmed if Defendants are allowed to proceed with their plan to obtain state court approval and disburse funds since Plaintiffs

will be unable to collect the Plan's funds except, if at all, after time-consuming and costly litigation. Moreover, Defendants may be able to argue that a finding in the state court regarding the Plan's rights would preclude the Plan from obtaining a determination by this Court.

IV. PRELIMINARY INJUNCTION

20. Pursuant to Fed. R. Civ. P. 65, upon notice and hearing, Plaintiffs are entitled to a preliminary injunction enjoining Defendants from (1) seeking state court approval of their settlement or (2) cashing any checks received, or otherwise disposing of any funds received, pursuant to settlement of their claims against Janette and Eric Knudson, until the rights of Plaintiffs have been determined by this Court.

V. PERMANENT INJUNCTION

21. Defendants have failed to honor Plaintiffs' subrogation rights under the Plan. Accordingly, pursuant to Fed. R. Civ. P. 65, Plaintiffs are entitled to a permanent injunction preventing Defendants from cashing any checks, or otherwise disposing of any funds, received in their claims against Honda, Galpin, and Hyundai, and enjoining Defendants to tender to Plaintiffs $411,152.11, the amount the Plan has paid on behalf of Janette Knudson.

PRAYER FOR RELIEF

22. Plaintiffs request that they have a declaratory judgment, temporary restraining order, preliminary

injunction, and permanent injunction against Defendants preventing Defendants from cashing any checks received, or otherwise disposing of any funds received, pursuant to settlement in their claims and an injunctive order enjoining Defendants to reimburse the Plan in the amount of $411,152.11, including appropriate prejudgment and post-judgment interest and for any other relief to which it is entitled, and that it be awarded its reasonable attorneys' fees and costs.

Dated: July 3, 1997

Respectfully submitted,

FORD & HARRISON LLP

BY: /s/ Linda Claxton
Linda Claxton Johnson
JACKSON, LEWIS, SCHNITZLER & KRUPMAN

By: /s/ Thomas H. Lawrence
Thomas H. Lawrence

VERIFICATION

I, as Chief Financial Officer for the Health and Welfare Plan for Employees of Earth Systems, Inc., verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to my personal knowledge, information and/or belief.

Dated this 3rd day of July, 1997 at Palo Alto, CA.

/s/ Jerol Brown
Jerol Brown

THIS CONSTITUTES NOTICE
OF ENTRY AS REQUIRED
BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, et al., Plaintiffs, v. JANETTE KNUDSON, et al., Defendants.	CV 97-3745 JMI (JGx) **ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER** (Filed Jul. 9, 1997)

IT IS HEREBY ORDERED:

This Court is in receipt of Plaintiffs' *ex parte* Application for a Temporary Restraining Order. This Court is also in receipt of Defendants' Oppositions. After careful review, considering all the arguments and materials presented by the parties, the Application is hereby DENIED.

BACKGROUND

This action arises under the Employee Retirement Income Security Act of 1974 ("E.R.I.S.A."), codified at 29 U.S.C. § 1001, *et seq.* Plaintiff Great-West Life & Annuity Insurance Company ("Great-West") is the assignee for collection of the health and welfare plan for employees of Earth Systems, Inc. ("Earth Systems"). Defendants are

Janette and Eric Knudson, husband and wife. Mr. Knudson was an employee of Earth Systems when he and his wife were involved in an automobile accident which left Mrs. Knudson a quadriplegic for life.

Defendants in 1993 sued Hyundai Motors of America, and others, in Los Angeles Superior Court. Though Plaintiff Great-West was the assignee with rights of subrogation on an E.R.I.S.A. funded policy, it did not until recently seek to intervene in that action. Instead, when the Knudsons and Hyundai agreed on a $650,000.00 settlement, Great-West removed that case to federal court (*Knudson, et al. v. Hyundai Motors of America, Inc., et al.*, CV 97-2801 JMI (ANx)). This Court recently remanded that case because Great-West, a non-party in that action, had no right to remove the case to federal court.

At about the same time, Plaintiffs filed the instant action. They have now applied for a Temporary Restraining Order, asking this Court to enjoin the state court from approving the settlement agreement and enjoining Defendants from receiving any settlement funds. Plaintiff Great-West alleges that it is entitled to $411,157.11 of the settlement proceeds because it paid out that amount in plan benefits to pay for Defendants' medical expenses. Because the E.R.I.S.A. plan provided for first-lien reimbursement of medical expenses recovered from third parties, Plaintiff Great-West argues that it is entitled to injunctive relief.

ANAYLSIS

Interlocutory injunctive relief is appropriate if the moving party can show either: (1) a likelihood of success

on the merits and the possibility of irreparable injury; or (2) that serious questions exist on the merits and the balance of hardships tips sharply in its favor. *Associated Gen. Contractors of Cal. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). Alternatively, a court may issue an injunction if it finds: (1) a strong likelihood of success on the merits; (2) a possibility of irreparable injury to the moving party; (3) that the balance of hardships favors the moving party; and (4) in certain cases, that the public interest favors injunctive relief. *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

In this case, injunctive relief is not appropriate. It is well settled that a federal court may not enjoin a state court proceeding "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. This rule codifies the general rule of restraint in cases such as this, where an unnecessary injunction against a separate sovereign promises to disrupt the delicate balance of federalism. In this case, Plaintiffs have made no showing that there exists any of the three narrow exceptions mandated by statute. For that reason alone, the Application must fail.

Also, it appears that Plaintiff is not likely to succeed on the merits. The settlement agreement, which promises to provide $650,000.00 to the Knudsons, allocates damages as follows:

Loss of Earnings	5%
Past Medical Expense	5%
Future Medical Expense	45%
Loss of Enjoyment of Life; Distress; Long-Term Disability	40%
Other	5%

Because past medical expenses reflect only five per cent of the proposed settlement amount, it does not appear that Plaintiff Great-West will be entitled to full subrogation. Rather, it appears that Great-West will ultimately recover far less than the amount it seeks here.

Two more reasons support denial of Plaintiffs' Application. Plaintiffs have not alleged irreparable harm, as their rights of subrogation remain intact, leaving them an adequate legal remedy to recover what they are rightly due once the settlement is paid. Further, Great-West has filed this Application after failing for three years to intervene in the state court action. Such a glaring omission raises a strong suspicion that Plaintiffs are forum shopping at the eleventh hour.

CONCLUSION

Accordingly, Plaintiff's Application is hereby DENIED.

IT IS SO ORDERED.

DATED: July 9, 1997

/s/ James M. Ideman
James M. Ideman
United States District Judge

JEFFREY S. POP & ASSOCIATES
Jeffrey S. Pop, Esq. – State Bar #054343
9107 Wilshire Boulevard
Suite 600
Beverly Hills, California 90210
(310) 273-5462 (310) 274-7749 (Fax)

Attorneys for Defendant
JANETTE KNUDSON

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., Plaintiffs v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Defendants.	)	Case No.: CV 97-3745 JMI (JGx) DEFENDANT JANETTE KNUDSON'S ANSWER TO PLAINTIFFS' FIRST AMENDED VERIFIED COMPLAINT

Defendant Janette Knudson, an Individual, through her attorney of record, Jeffrey S. Pop & Associates, a Law

Corporation by Jeffrey S. Pop, hereby responds to the Verified First Amended Complaint as follows:

1. In response to Paragraph 1 of the Complaint, Defendant Janette Knudson, an individual, upon information and belief, admits that Plaintiffs are bringing this action allegedly under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 but otherwise denies generally and specifically, each and every other allegation contained in Paragraph 1 of the Complaint.

2. In response to Paragraph 2 of the Complaint, Defendant Janette Knudson lacks sufficient information and belief to admit or deny the allegations contained in Paragraph 2 and therefore denies generally and specifically, each and every allegation contained in Paragraph 2 of the Complaint.

3. In response to Paragraph 3 of the Complaint, Defendant Janette Knudson lacks sufficient information and belief to admit or deny the allegations contained in Paragraph 3 and therefore denies generally and specifically, each and every allegation contained in Paragraph 3 of the Complaint.

4. In response to Paragraph 4 of the Complaint, Defendant Janette Knudson admits that she is a citizen and resident of Los Angeles County but based upon lack of sufficient knowledge and belief, denies, generally and specifically, each and every other allegation contained in Paragraph 4 of the Complaint.

5. In response to Paragraph 5 of the Complaint, Defendant Janette Knudson denies generally and specifically, each and every allegation contained in Paragraph 5 of the Complaint.

6. In response to Paragraph 6 of the Complaint, Defendant Janette Knudson admits that she resides in the central district but denies, generally and specifically, each and every other allegation contained in Paragraph 6 of the Complaint.

7. In response to Paragraph 7 of the Complaint, Defendant Janette Knudson admits that Defendant Eric Knudson was at one time an employee of Earth Systems, Inc. but does not have sufficient knowledge and belief upon which to admit or deny the other allegations as set forth in Paragraph 7 and based upon such information and belief Defendant Janette Knudson, denies, generally and specifically, each and every other allegation contained in Paragraph 7 of the Complaint.

8. In response to Paragraph 8 of the Complaint, Defendant Janette Knudson admits each and every allegation contained in Paragraph 8 of the Complaint.

9. In response to Paragraph 9 of the Complaint, Defendant Janette Knudson does not have sufficient knowledge and belief to admit or deny the amount for medical benefits that were paid for by the Plan. Based upon such lack of information and belief, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 9 of the Complaint.

10. In response to Paragraph 10 of the Complaint, Defendant Janette Knudson does not have sufficient knowledge or belief to admit or deny the allegation set forth in Paragraph 10 of the Complaint and based upon lack of such information, denies generally and specifically, each and every allegation contained in Paragraph 10 of the Complaint.

11. In response to Paragraph 11 of the Complaint, Defendant Janette Knudson does not have sufficient knowledge or belief to admit or deny what documents, if any were signed by Eric Knudson. Based upon such lack of knowledge and belief, Defendant Janette Knudson therefore denies, generally and specifically, each and every allegation contained in Paragraph 11 of the Complaint.

12. In response to Paragraph 12 of the Complaint, Defendant Janette Knudson admits that the gross settlement was approved by the Superior Court after proper notice. A true copy of said order approving settlement and for the establishment of a Special Needs Trust is attached hereto as Exhibit 1 and incorporated by this reference herein. Defendant Janette Knudson denies, generally and specifically, each and every other allegation contained in Paragraph 12 of the Complaint.

13. In response to Paragraph 13 of the Complaint, Defendant Janette Knudson lacks sufficient knowledge and belief to admit or deny and therefore, denies, generally and specifically, each and every allegation contained in Paragraph 13 of the Complaint.

14. In response to Paragraph 14 of the Complaint, Defendant Janette Knudson alleges that she obeyed the

Court Order, a true copy of which is attached hereto as Exhibit 1, including the reimbursement to the Plan through her attorney in the amount of Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70), as ordered by the Court but denies, generally and specifically, each and every other allegation contained in Paragraph 14 of the Complaint.

15. In response to Paragraph 15 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 15 of the Complaint.

16. In response to Paragraph 16 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 16 of the Complaint.

17. In response to Paragraph 17 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 17 of the Complaint.

18. In response to Paragraph 18 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 18 of the Complaint.

19. In response to Paragraph 19 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 19 of the Complaint.

20. In response to Paragraph 20 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 20 of the Complaint.

21. In response to Paragraph 21 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 21 of the Complaint.

22. In response to Paragraph 22 of the Complaint, Defendant Janette Knudson denies, generally and specifically, each and every allegation contained in Paragraph 22 of the Complaint.

AFFIRMATIVE DEFENSES

FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

23. Plaintiff Great-West by refusing to intervene in State Court action and/or by failing to file a lien in State Court has waived its right to bring this matter in Federal Court Order in order to appeal the Superior Court Order entered which is attached hereto as Exhibit 1.

FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

24. Plaintiff, due to its waiver, is prevented from bringing this action against Defendant Janette Knudson.

FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

25. Defendant Janette Knudson, through her attorney, has complied with Court Order attached hereto as Exhibit 1 and a client trust account check in the amount of Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70) was sent to Great-West pursuant to the Court Order which settles this matter.

FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

26. Plaintiff Great-West is collaterally estopped from bringing this action.

FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

27. Defendant Great-West is barred from bringing this claim under the "Make Whole Rule" which governs this recovery litigation as set forth in *M. Barnes v. Independent Automobile Dealers Assoc. of Calif. Health & Welfare Benefit Plan* 64 F.3d 1389, 1393 (9th Cir. 1995).

FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

28. Plaintiff Great-West is guilty of unclean hands in its actions herein which provides complete defense to this action.

FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

29. Plaintiff Great-West impliedly admits in Paragraph 12 that its Plan's document did not allow for a first recovery of all monies expended and this action explicitly conflicts with the "Make Whole Rule."

FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

30. Plaintiff Great-West did not give any consideration for the alleged signature of Eric Knudson on any documents as alleged in Paragraph 11 and therefore such lack of consideration bars this action.

FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

31. Janette Knudson and Eric Knudson were separated and had irreconcilable differences following the June 10, 1992 tragic accident. Defendant Eric Knudson failed to obtained consent of Janette Knudson and failed

to disclose the alleged existence of the document referred to in Paragraph 11 of this Complaint.

FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

32. Any insurance or ERISA Plan document properly disseminated must be read in its entirety.

FOR A ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

33. Upon information and belief, Defendant Janette Knudson alleges that the Complaint has failed to join the employer, an indispensable party and as such must be dismissed.

FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

34. Defendant Janette Knudson alleges that Plaintiff Great-West is guilty of fraud with respect to its conduct in attempting to modify the terms and conditions of the ERISA Plan after June 10, 1992.

FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

35. Plaintiff's claim is barred under the equitable principle of laches in that all proceeds were distributed as ordered by the Superior Court before the service of this case on Defendant Janette Knudson.

FOR A FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

36. Plaintiff failed to notify the State Court or Defendant of its continuing claim after receiving notice of the Motion heard on July 23, 1994 following the Federal Court's remand of the underlying case in Superior Court. Such failures support the equitable principle of waiver, laches and unclean hands as affirmative defenses herein.

FOR A FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

37. Both Earth Systems and Plaintiff failed to notify Janette Knudson of any ERISA plan document which prevented her from commencing litigation for those allegedly responsible for her injuries or which provided for the first right of complete reimbursement from a settlement of any such litigation prior to June 10, 1992.

FOR A SIXTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

38. Earth Systems failed to properly follow statutory requirements mandated by ERISA with respect to any claim it had or by giving notification to Janette Knudson before and during the time that Janette Knudson was receiving medical treatment that was allegedly paid for by a health plan.

FOR A SEVENTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

39. Defendant Janette Knudson did not receive any extraordinary or different medical benefits for which she gave an independent consideration to Earth Systems and/or Great-West. Such lack of consideration is a complete defense to this action.

FOR A EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

40. Plaintiffs failed to timely file and serve this action. Defendant Knudson alleges that all acts of performance for which a permanent injunction or a temporary restraining order is requested occurred prior to the service of the Complaint in this case. Plaintiff's own dilatory conduct prevents it from obtaining any injunctive relief as prayed for in this case.

FOR A NINETEENTH, SEPARATE AND AFFIRMATIVE DEFENSE,

DEFENDANT ALLEGES:

41. The acts complained of by Plaintiff have been completed in accordance with a valid order of the Superior Court, a copy of which is marked as Exhibit 1 to this Answer and incorporated by this reference herein.

WHEREFORE, Defendant Janette Knudson prays for judgment as follows:

1. That the Complaint be dismissed in its entirety;

2. That Defendant Janette Knudson recover attorneys fees as permitted by statute;

3. That Defendant Janette Knudson be entitled to recover costs as incurred herein;

4. That Defendant Janette Knudson be entitled to any relief that the Court deems is just and proper herein;

Dated: August 21, 1997

JEFFREY S. POP & ASSOCIATES

By: /s/ Jeffrey S. Pop
Jeffrey S. Pop, Esq.

Attorneys for Defendant
JANETTE KNUDSON

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV 97-3745 JMI (JGx)
[Caption Omitted In Printing]

DECLARATION OF JANETTE KNUDSON

I, Janette Knudson, declare:

1. I am Plaintiff in the case entitled *Knudson v. Hyundai Motors Company, et al.*.

2. On June 10, 1992, I became a quadriplegic during a rollover accident involving a 1991 Hyundai Excel at which I was driving.

3. I have given my deposition in this litigation. Since December 19, 1993, I have been represented by attorney Jeffrey S. Pop in the above-captioned litigation.

4. I understand the parameters of the Special Needs Trust. I need the assistance of a Trustee to help manage my financial problems and I have a substantial physical handicap.

5. To the best of my knowledge, I have never signed any documents which provided for liens for health care regarding my injuries. In fact, until January 9, 1997, I was *not* aware that Great West Life and Annuity was asserting any claim against this case.

6. I am aware that Medi-Cal has a lien for the health care coverage they have provided to me. I fully expect and understand that Medi-Cal will be repaid.

7. Unfortunately, after my injury, my husband and I have remained separated and have been living apart. At

no time after June 10, 1992, have we been able to reconcile and live together. I am the custodial parent for our daughter, Jenna Knudson, who has resided with me from the time I was released from the rehabilitation hospital to date for a period over four (4) years.

8. At no time has my estranged husband, Eric Knudson, ever discussed with me the fact that he made any promises to any health care provider or subrogation company regarding my case.

9. Eric Knudson is a Plaintiff in this litigation and has his own counsel, attorney David Lederer.

10. I have reviewed the costs incurred by Jeffrey S. Pop & Associates in preparing my case for trial. I am aware of the testing, time, effort, and numerous experts employed by Jeffrey S. Pop, Esq. as consultants in order to attempt to prove the crash worthiness theory that has been advanced in this litigation. I, along with the Trustee, Louise Curinga, has reviewed the costs incurred as itemized as One Hundred Sixty-One Thousand Seven Hundred Sixty Dollars ($161,760.00). I do not object to these costs.

11. I understand and appreciate that my attorney has reduced his attorney's fees from Forty Percent (40%) to Thirty-Three and One-Third Percent (33⅓%) which in effect in [sic] will allow Forty-Three Thousand Three Hundred Thirty-Four Dollars ($43,334.00) more to be funded into the Janette Knudson Special Needs Trust.

12. I do not understand the claims be[ing] made by Great West Life Annuity Company since my husband paid for health insurance premiums through his former

employer. I never was provided care other than that allowed under the original health insurance policy to my knowledge. I believe that after the first year or so, my husband, Eric Knudson, lost his job at Earth Systems. I believe that through COBRA rights and another insurance company paid for my health care.

13. I understand the rationale for settlement of this case in the gross amount of Six Hundred Fifty Thousand Dollars ($650,000.00). I further understand that if this case proceeded to trial without a satisfactory result that I would receive no compensation for my injuries.

14. This compromise settlement will provide funds for The Janette Knudson Special Needs Trust which may assist the ease of my living for several years.

15. Under these circumstances, I agree to the settlement. I regret that a Special Needs Trust be approved. I request that the Court use fairness and equity in deciding the dispute of Great West. I have no objection to repaying the amount of the Medi-Cal lien as required by law.

I have read this Declaration which consists of Four (4) pages and I declare under penalty of perjury that the foregoing is true and correct. Executed this 24 day of March, 1997 at [Illegible], California.

/s/ J Knudson
Janette Knudson

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV 97-3745 JMI (JGx)
[Caption Omitted In Printing]

THE JANETTE KNUDSON SPECIAL NEEDS TRUST

THIS TRUST AGREEMENT is established as of this ___ day of ___, 1997 for the benefit of JANETTE KNUDSON whose date of birth is October 31, 1958 (hereinafter "the beneficiary") pursuant to a court-approved settlement in proceedings titled, for purposes of convenient reference, *Knudson v. Hyundai*, Los Angeles Superior Court No. LC022329. LOUISE CURINGA is the initial trustee of this trust. Unless otherwise specified, the term "trustee" as used herein shall refer to LOUISE CURINGA and any successor trustee. The singular term "trustee" as hereinafter used shall include the plural term "trustees" unless the context indicates otherwise.

ARTICLE I DESCRIPTION OF TRUST CORPUS

The trust corpus shall include any and all amounts designated as payable to the trustee hereunder resulting from the above-referenced litigation which the trustee is expressly authorized to accept and to hold in trust as hereinafter directed. The trustee hereby acknowledges receipt of the assets described in Schedule A attached hereto, which assets together with any other property of the trust shall be held, administered and distributed in trust as hereinafter provided. Except as herein expressly provided, no additions to the trust corpus may be made from any other source.

ARTICLE II REVOCATION AND AMENDMENT

This trust is irrevocable and not subject to amendment by any person.

ARTICLE III DISPOSITION OF TRUST ESTATE

The trust estate shall be held, administered, and distributed for the benefit of JANETTE KNUDSON (sometimes hereafter referred to as "the beneficiary") as follows:

A. *Introduction.* JANETTE KNUDSON suffers from a disability which substantially impairs her ability to provide for her own care and custody and which constitutes a substantial handicap. It is the intent of this instrument that this trust continue in existence as a supplemental (and emergency) fund to public assistance for JANETTE throughout her life unless earlier terminated under the trust's provisions. Currently there exist basic living needs such as special programs and equipment which public benefits may not provide. It is vitally important that JANETTE continue to receive these services in order to maintain a level of human dignity and humane care. If this trust were to be invaded by creditors, subjected to any liens or encumbrances, or cause public benefits to be terminated, it is likely that the trust corpus would be depleted prior to JANETTE's death, especially since the cost of care for disabled persons (not including any emergency needs) is high. In this event, there would be no coverage for emergencies or supplementation for basic needs. The following trust provisions should be interpreted in light of these concerns and this stated intent.

B. *Special Needs.* The trustee shall pay to or apply for the benefit of JANETTE KNUDSON such amounts from the principal or income, up to the whole thereof, as the trustee in the trustee's sole discretion may from time to time deem necessary or advisable for the satisfaction of the beneficiary's special needs, and any income not distributed shall be added to principal. As used in this instrument, "special needs" refers to the requisites for maintaining the beneficiary's good health, safety and welfare when in the discretion of the trustee such requisites are not being provided by any public agency, office or department of any city, county, or state government, or by the federal government or any other public or private agency. "Special needs" shall include, but not be limited to, attendant care and special equipment not available from Medi-Cal or other public resources; transportation; programs of training and treatment; and necessary recreation and entertainment not available from public benefits.

C. *Spendthrift.* No interest in the principal or income of this trust shall be anticipated, assigned or encumbered, or shall be subject to any creditor's claim or to legal process, prior to its actual receipt by the beneficiary. Furthermore, because this trust is to be conserved and maintained for the special needs of JANETTE KNUDSON, no part of the corpus thereof, neither principal nor undistributed income, shall be construed as part of the beneficiary's "estate" or be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential care, by any city, county, or state government, or by the federal government or any

other public or private agency except as otherwise provided herein.

D. *Public Benefits.* The trustee is not responsible for seeking support and maintenance for the beneficiary from available public resources. However, in making distributions to or for the beneficiary for her special needs as herein defined, the trustee shall take into consideration the applicable resource and income limitations of the public benefit programs for which the beneficiary is eligible, including Supplemental Security Income (SSI), Medi-Cal, and any other appropriate state or local agency serving the disabled. All references in this instrument to "Medi-Cal" shall include any other state's Medicaid program equivalent.

E. *Supplemental.* No part of the corpus of the trust created herein shall be used to supplant or replace public assistance benefits of any city, county, state, federal or other governmental agency which has a legal responsibility to serve persons with disabilities which are the same or similar to the impairment(s) of the beneficiary herein. For purposes of determining the beneficiary's eligibility for SSI, Medi-Cal, AFDC, In-Home Support Services (IHSS) and rehabilitation service from the State Department of Rehabilitation and any other program of public benefits, no part of the principal or undistributed income of the trustee estate shall be considered as a resource to said beneficiary. In addition, no part of the trust may be used for the recurring needs of AFDC recipients under MPP Section 42-211.256. In the event a trustee is requested to release principal or income of the trust to or on behalf of the beneficiary to pay for equipment, medication, or services which Medi-Cal is authorized to

provide (were it not for the existence of this trust), or in the event a trustee is requested to petition the court or any other administrative agency for the release of trust principal or income for this purpose, the trustee is authorized to deny such request and to take whatever administrative or judicial steps may be necessary to continue the Medi-Cal eligibility of the beneficiary, including obtaining instructions from a court of competent jurisdiction ruling that the trust corpus is not available to the beneficiary for Medi-Cal eligibility purposes. Any expenses of the trustee in this regard, including reasonable attorney's fees, shall be a proper charge to the trust estate.

F. *Trust Termination.* Unless earlier terminated under the provisions of this instrument and subject to the notice and payback provisions of Paragraph I of this Article III, the trust shall cease on the death of JANETTE KNUDSON and the undistributed balance of the trust estate shall be distributed as the beneficiary may direct by the exercise of a special power to appoint the balance of the principal and any undistributed income of the trust estate, or any part thereof, to any one or more persons or entities, or trusts for their benefit, other than the beneficiary's estate, the beneficiary's creditors, or creditors of the beneficiary's estate. Such power of appointment shall be exercised only by a provision in the beneficiary's last Will or Codicil expressly exercising such power. Unless within thirty (30) days after the beneficiary's death the trustee has actual notice of the existence of a Will or Codicil exercising such power (whether or not the document has been filed or admitted to probate), the trustee shall, without incurring any liability to any appointee, proceed as if

such power had not been exercised; however, this sentence shall not bar any right which an appointee may have to enforce the appointment.

Any part of the trust estate with respect to which the beneficiary shall not have exercised the above special power of appointment shall be distributed to the beneficiary's daugther, JENNAFER KNUDSON, if then living, otherwise, to JENNAFER's then-living issue, by right of representation. If JENNAFER is then deceased and leaves no issue then living, the undistributed balance of the trust estate shall be distributed to the heirs at law of JANETTE KNUDSON, their identities and respective shares to be determined in accordance with the laws of the State of California then in effect governing the succession of separate property not acquired from a predeceased spouse.

Any portion of the trust estate distributable to a person who has not attained age twenty-one (21) on the date of distribution shall be distributed to a custodian of the trustee's selection to be held for such person until he or she attains age twenty-one (21) under the California Uniform Transfers to Minors Act.

G. *Backstop*. Notwithstanding anything to the contrary contained in the other provisions of this trust, in the event that the existence of this trust has the effect of rendering the beneficiary ineligible for Supplement Security Income (SSI), Medi-Cal, or any other program of public benefits, or in the event a claim is asserted by a third party, including a public entity, against any trust assets, the trustee may (but is not required) to terminate

this trust, in whole or in part. Prior court approval shall be required for any termination under this provision.

Thereupon, the portion so terminated, subject to the provisions of Paragraph I, shall be distributed, free of trust, to the persons and in the relative shares set forth in the foregoing Paragraph F as if the beneficiary were then deceased and failed to exercise the special power of appointment referred to therein; provided, however, that termination under this paragraph may only occur if the person or persons to whom the trust assets are distributed has attained the age of twenty-one (21).

It is the intent of this instrument that after termination of the trust under the foregoing provision, the distributee shall conserve, manage and distribute the proceeds of the former trust estate for the benefit of JANETTE KNUDSON to ensure that she has sufficient funds for her basic living needs when public benefits are unavailable or insufficient. This request pertaining to the management of the trust proceeds after the termination of the trust is precatory, not mandatory.

In determining whether the existence of the trust has the effect of rendering the beneficiary ineligible for SSI, Medi-Cal, or any other program of public benefits, the trustee is hereby granted full and complete discretion to initiate either administrative or judicial proceedings, or both, for the purpose of determining eligibility and all costs relating thereto, including reasonable attorney's fees, shall be a proper charge to the trust estate.

H. *Expenses*. Upon the death of JANETTE, the trustee may pay any death taxes that may by reason of said beneficiary's death be due regarding the trust assets,

and all expenses of said beneficiary's last illness and funeral, and expenses related to administration and distribution of the trust estate if, in the trustee's discretion, other satisfactory provisions have not been made for the payment of such expenses.

I. *Compliance with Federal and State Law.* It is the intent of this instrument, as confirmed by the Court's approval of this document in *Knudson v. Hyundai*, that this trust shall not be construed as an available resource to the beneficiary by reason of the provisions of Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (42 U.S.C. § 1396p(d) (4) (A)). In order to comply with the foregoing, the trustee is hereby directed that on the death of the beneficiary or other termination of the trust the trustee shall satisfy from the balance of the trust assets any and all proper state claims for reimbursement for medical assistance paid on behalf of the beneficiary under a State plan up to an amount equal to the total medical assistance paid. In addition, on the death of the beneficiary or other termination of the trust, the trustee shall give such notice as required by California Probate Code Section 3605(c) or successor provision thereto.

J. *Separate Fund.* In the event the trustee accepts public benefits of the beneficiary as a trust asset and agrees to administer such benefits as a part of the trust estate, all such benefits and all earnings of the beneficiary of this trust shall not be commingled with other trust assets but shall be separately held by the trustee.

K. *No Perpetual Trusts.* Unless terminated at an earlier date under the foregoing provision, any trust created under this Agreement shall cease on the date which

is twenty-one (21) years after the decease of the last to survive of the beneficiaries alive or in being at the time of the beneficiary's decease and thereupon the trustee shall distribute and deliver all of the balance of any share of the trust estate or any portion thereof then held for the benefit of a living beneficiary of said trust to such beneficiary or to his or her legal representative.

ARTICLE IV SUCCESSOR TRUSTEE

LOUISE CURINGA shall serve as initial trustee of this trust. If she is unwilling or unable, for any reason, to act or to continue to act as trustee, then WAYNE SMITH shall serve as trustee.

Notwithstanding the foregoing nomination of successor trustees, JANETTE KNUDSON may designate a different order of successor trustees or name different individuals or entities as successor trustees, by an instrument in writing dated and signed by her. Unless the successor trustee named in this instrument has actual notice of the existence of a written nomination separate from this instrument, the nomination of successor trustee contained in this instrument shall be construed as fully effective and the successor trustee nominated herein may proceed as if a separate nomination does not exist. No person who acts in reliance upon any representation made by a successor trustee as to his or her authority to act in such capacity shall incur any liability to the beneficiary, the trustor, or heirs of the beneficiary and trustor for permitting the successor trustee to exercise any powers under this instrument.

Any trustee serving hereunder shall have the power, exercisable at any time and from time to time, to appoint any person or persons, or bank or trust company as an agent or custodian with respect to the trust assets and with respect to any duties herein placed upon the trustee.

Any trustee may at any time resign from any trust hereby established by depositing in the United States mail, postage prepaid, a notice of such resignation addressed to the person or persons then entitled to receive payments hereunder at the addresses of such person or persons last known to the trustee, and such resignation shall take effect at the expiration of sixty (60) days from the date of mailing such notice, and the Affidavit of any officer of a corporate trustee as to the date of mailing such notice shall be conclusive evidence of its mailing.

Upon resignation or the occurrence of a vacancy in the position of trustee for any reason, unless provision is made under this Trust Agreement for the appointment of a successor, the following in the order of prior right hereafter listed shall have the power and preference to designate a successor trustee or trustees to act when no other trustee is designated as successor trustee by this instrument:

1. Beneficiary's Representative.

2. A court of competent jurisdiction under California Probate Code Section 17000 *et seq.*, or successor provisions thereto.

All such designations shall be exercised in writing and shall be effective on delivery to the successor trustee

and the beneficiary of the trust. Any successor trustee, however appointed, shall be responsible only for those trust assets actually received and shall have no duty or obligation to inquire into the acts or omissions of any predecessor trustee.

Except with respect to the power to appoint a successor trustee, all trustees, however appointed, shall have the same power as such original named trustee.

ARTICLE V BOND

A surety bond in an amount set by the Court shall be required of any person serving as trustee hereunder.

ARTICLE VI INCAPACITY DETERMINATION

If any power holder or any trustee serving hereunder shall become incapacitated through illness, age or other cause, such person shall no longer have the power to exercise any rights reserved in this trust as power holder, trustee or otherwise. Incapacity may be determined by the power holder delivering to the trustee or the trustee delivering to any person nominated herein as successor trustee a written instrument declaring from and after such receipt that he or she shall no longer have the power to exercise any rights reserved in this trust; or one (1) physician with at least five (5) years of clinical experience after completion of residency may deliver to the trustee in the event of the incapacity of the power holder or the successor trustee in the event of the incapacity of the trust a certification in writing that said person no longer has the capacity as a result of illness, age or other cause

to exercise any rights reserved in this trust; provided, that if such physician (or successor) described above delivers a certification in the manner directed above stating the power holder or trustee's incapacity has terminated, then the power holder (or trustee) shall be deemed restored to full capacity for purposes of this Agreement. The appointment of a conservator of either the person or the estate, or both, of a power holder or trustee shall be a conclusive determination of incapacity for purposes of this Article.

ARTICLE VII PROVING CHANGE OF TRUSTEE

Whenever a trustee succeeds to office for any reason, such succession shall be evidenced by the written certification of the Beneficiary's Representative that the successor is the duly-acting trustee or co-trustee and all third parties may rely on such certification as evidence of the trustee's succession. Neither successor trustees nor third parties shall have any liability to the trust or any trust beneficiaries for good faith dealings in reliance upon the documentation specified in this Article.

ARTICLE VIII TRUSTEE POWERS

The trustee, in administering the trusts established under this Agreement, shall have full power and authority, with due regard to the fiduciary obligations of a trustee, in such manner and upon such conditions as the trustee may determine:

A. As to any real property subject to the trust, to make agreements concerning, give and take assignments

of lease and assignments of mortgage or the beneficial interest under a deed of trust, bargain for, give and take bills of sale, give and take bonds concerning, borrow against and extend and renew loans, contract for, convey, covenant, grant a deed of trust, demise, exchange, extend and renew any obligation, give evidence of debt, give an estoppel certificate, give and request full and partial releases or satisfactions of mortgage and deeds of trust, grant hypothecate and encumber by deed of trust, or otherwise, hypothecate, indemnify, give or take indentures or mortgages, lend against, lease, let, mortgage, negotiate for and to sign, execute, acknowledge and deliver any grant, quitclaim, joint tenancy, or other deed or note, partition, purchase, receive, receipt, remise, release, sell, sublease, transfer, and make such other instruments in writing of any kind or class as may be necessary and proper in the premises and to collect rents, disburse funds, hire professional property manager, to repair and improve, take and possess any such real property.

B. To purchase and retain, without liability for doing so, assets, whether real or personal, which are exempt for purposes of eligibility for the SSI and Medi-Cal programs, including, but not limited to, a principal residence for use by the trust beneficiary, with or without rent charged to the beneficiary as the trustee shall determine, regardless of whether the particular asset so retained is a kind and quality of which the trustee would ordinarily purchase for trust accounts;

C. To invest, reinvest and, to the extent deemed advisable by the trustee, to keep invested the assets of the

trust estate that persons of prudence, discretion and intelligence acquire for their own account, in stocks (common and preferred, including puts, calls and options, whether for cash, credit or on margin, and including shares in investment companies, investment trusts or mutual funds) bonds, debentures, notes or any other types of securities, interests, assets on property, whether real or personal, or in shares or units of participation in common trust funds, or to participate in making investments with others;

D. To borrow money for the benefit of the trust on such terms and conditions as the trustee may deem proper and, if the trustee shall determine it to be necessary, to encumber the trust property or any part thereof by mortgage, deed of trust, pledge or otherwise, as security therefor;

E. To hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery, but the trustee shall be liable for any act of the nominee in connection with the security so held;

F. To appoint and employ such agents and employees as the trustee may deem necessary or advisable, including (without limiting the generality of the foregoing) accountants, attorneys, investment counselors, and custodians of the trust property, and to compensate any person or entity serving as conservator for the beneficiary reasonable amounts for services rendered in this capacity and as reimbursement for reasonable out-of-pocket expenses;

G. To incur and pay all taxes, assessments, costs, charges, fees and other expenses of every kind with respect to the trust which the trustee may deem necessary or advisable in the administration of any trust hereby created, including reasonable fees of the trustee, and to compromise or otherwise adjust claims in favor of or against the trust;

H. To continue to hold the property received into the trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust.

I. To make divisions or distributions of trust property in pro rata or non pro rata divisions or distributions, in cash or in kind or partly in cash and partly in kind, including undivided interests in any property, whenever the trustee shall be required to make divisions or distributions of the trust estate pursuant to the terms hereof, and for this purpose to make such divisions and distributions made in kind or partly in kind at the fair market value of such trust property at the date or dates of such divisions or distributions, without regard to the adjusted basis for income tax purposes of any such property so distributed;

J. To exercise any and all powers now or hereafter conferred on the trustee by law, consistent with the purposes of the trust, or to disclaim any power, authority or discretion conferred upon the trustee by the provisions of this Agreement or by law by filing a written disclaimer with the beneficiary of the trust.

K. The trustee shall be entitled to reasonable compensation for services rendered and for counsel engaged by the trustee, including services in connection with the termination of revocation in whole or in part of any trust hereunder. Such compensation of the trustee and counsel shall be paid wholly from principal or wholly from income or partly from each as the trustee deems proper without prior court order, and the determination of the trustee shall be conclusive.

L. Additional property acceptable to the trustee may be added to any trust hereunder by any persons.

M. Income accrued or unpaid on trust property when received into the trust shall be treated as any other income.

N. Among successive beneficiaries of this trust all taxes and other current expenses shall be prorated over the period to which they relate on a daily basis.

O. Unless the trustee shall have received actual written notice of the occurrence of an event affecting the beneficial interest of any trust hereunder, the trustee shall not be liable to any beneficiary of any such trust for distribution made as though such event had not occurred.

P. If an individual trustee and a corporate trustee are acting, whenever there shall be a dispute, deadlock or difference of opinion between them on a question of joint discretion, a determination of the individual trustee shall be binding upon the corporate trustee, but the corporate trustee shall bear no liability or accountability for any act or transaction entered into as a result of the enforcement

of the individual trustee's privilege if it shall have dissented in writing in advance of such act or transaction.

Q. No trustee shall be liable to any trust beneficiary, or remainderman, or to an heir of the beneficiary for the trustee's acts or failure to act except for willful misconduct or gross negligence. The trustee shall be authorized to charge to the trust estate any attorney's fees and related costs incurred by the trustee in the trustee's defense against any action, cause of action, claim or demand made by anyone for any act or default of the trustee that does not result from the trustee's willful misconduct or gross negligence.

R. No successor trustee shall be liable for any act, omission, or default of a predecessor trustee. Unless requested in writing within sixty (60) days of appointment by an adult beneficiary or remainderman of the trust, no successor trustee shall have any duty to investigate or review any action of a predecessor trustee and may accept the accounting records of the predecessor trustee showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in the trust.

ARTICLE IX COURT SUPERVISION

Except as provided in Article X regarding accountings, there shall be no court supervision of this trust, although the provisions of Probate Code Sections 17000 *et seq.*, or other California Probate Code sections then in effect which govern such trusts, shall be applicable to the end that the Superior Court may entertain petitions with

respect to the administration of such trusts as therein provided.

ARTICLE X ACCOUNTINGS

Except as may be requested by an interested person under Probate Code Sections 17000 *et seq.*, or successor provisions thereto, or as may otherwise be required herein, there shall be no Court accountings required of the trustee or any successor trustee of this trust; provided, however, that the co-trustees serving hereunder, or successor trustee, shall prepare and deliver by regular mail, postage prepaid, to the Beneficiary's Representative at the address hereafter set forth (or other address as directed by the Beneficiary's Representative) an annual financial report in the form required by California Probate Code Section 16063, or successor provision thereto, which report shall include:

A. A statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last account;

B. A statement of the assets and liabilities of the trust as of the end of the last complete fiscal year of the trust or as of the end of the period covered by the account;

C. The trustee's compensation for the last complete fiscal year of the trust or since the last account;

D. The agents hired by the trustee, their relationships to the trustee, if any, and their compensation, for the last complete fiscal year of the trust or since the last account;

E. A statement that the recipient of the account may petition the court pursuant to Probate Code Section 17200 to obtain a court review of the account and of the acts of the trustee;

F. A statement that claims against the trustee for breach of trust may not be made after the expiration of three years from the date the beneficiary receives an account or report disclosing facts giving rise to the claim.

Unless the Beneficiary's Representative delivers a written objection to the trustee within thirty (30) days after receipt of an account, it shall be final and conclusive in respect to the transactions disclosed in the account as to all beneficiaries and remaindermen of the trust, including unborn and contingent beneficiaries and remaindermen. Further, after settlement of an account by agreement of the parties objecting to it or by expiration of the thirty (30) day period, the trustees shall no longer be liable to any beneficiary or remainderman of the trust in respect to transactions disclosed in the account, except for the willful misconduct or gross negligence of the trustee.

In the event the Beneficiary's Representative delivers a written objection to the annual report within the thirty (30) day period, the trustee shall submit an accounting to the court for review and approval in the form and pursuant to the procedures set forth in the California Probate Code for conservators.

JEAN OMAN, _____, shall serve as the Beneficiary's Representative. If she is unwilling or unable, for any reason, to act or to continue to act as the Beneficiary's Representative, JANETTE KNUDSON shall

appoint a successor Beneficiary's Representative. If JANETTE KNUDSON is unwilling or unable for any reason to appoint a successor Beneficiary's Representative, the person last serving as Beneficiary's Representative shall appoint a successor Beneficiary's Representative. Upon resignation or the occurrence of a vacancy in the position of Beneficiary's Representative for any reason if the provisions of this instrument fail to result in the designation and appointment of a successor Beneficiary's Representative, a court of competent jurisdiction shall appoint a successor Beneficiary's Representative. All such designations shall be exercised in writing and shall be effective on deliver to the successor Beneficiary's Representative. Any successor Beneficiary's Representative shall have the same power as such original named Beneficiary's Representative.

The Beneficiary's Representative shall be entitled to reasonable compensation for services rendered in this capacity, the amount and frequency of such compensation to be in the sole discretion of the trustee.

In the event that the above provisions fail to result in the appointment of a successor Beneficiary's Representative, then a court of competent jurisdiction shall appoint a successor pursuant to Probate Code Section 17000 *et seq.*, or successor provisions thereto.

ARTICLE XI DISCLAIMER OF TAX-SENSITIVE POWERS

It is the intent of this instrument that no trustee serving hereunder shall possess powers over the trust estate which would cause the trust assets to be included

in such person's taxable estate for federal estate tax purposes. In the event any power held in connection with this trust (which is not disclaimed) has the effect of causing any assets of the trust to be included in such person's estate for federal estate tax purposes, then such person's estate may assert a claim against the trust estate for the amount of any federal estate taxes required to be paid as the result of the power. If such person determines it necessary or advisable, he or she may disclaim any power granted herein by an instrument in writing. In the event of such a disclaimer, the disclaimed power shall terminate.

ARTICLE XII NO DISCHARGE OF OBLIGATIONS

No trustee serving under this Agreement shall make or join in any decision to pay, apply or distribute trust income or principal for the discharge of any of the legal obligations of the trustee, including, but not limited to any obligation of support which the trustee may owe to the beneficiary under the laws of the state where the trustees reside.

ARTICLE XIII LAW PERTAINING TO TRUST

This Agreement shall be administered in the State of California though, in fact, the trustee may reside elsewhere and its validity and construction shall be controlled by the laws of California.

ARTICLE XIV CONTESTS

Should any beneficiary provided for herein, either directly or indirectly, contest or attack this Agreement or any of its provisions, or aid another in so doing, or attempt to provide for the disposition of the trust estate other than as this instrument has provided, then, in that event, any provisions made herein for such contesting beneficiary are hereby revoked and any such portion of the trust estate to which such contesting beneficiary would have been entitled shall be held, applied and distributed as if such contesting beneficiary had predeceased JANETTE KNUDSON without issue. The trustee is hereby authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions.

ARTICLE XV INTENTIONAL OMISSIONS

Except as otherwise provided in this instrument, it is the intent of this instrument to intentionally and with full knowledge omit to provide herein for any person not named herein.

ARTICLE XVI PAYMENTS TO OTHERS

When any beneficiary entitled to receive payments hereunder is, in the absolute judgment of the trustee, mentally or physically incompetent (irrespective of whether legally so adjudicated), the trustee may in her discretion expend or apply such payments for the benefit of the beneficiary or to the person or persons with whom such beneficiary then resides.

ARTICLE XVII TERMINATION WHERE SMALL

If the value of the assets held in any trust hereunder in the discretion of the trustee becomes sufficiently small that the administration thereof is no longer economically desirable, the cost thereof is disproportionate to the value of the assets, or the continuation thereof is no longer in the best interests of the beneficiary, the trustee may terminate such trust. Upon termination as herein provided, the trustee shall distribute the property of such trust to or on behalf of the beneficiary.

ARTICLE XVIII COPIES OF TRUST

This Agreement may be executed in counterparts, with each duplicate being considered the original document for all purposes. In addition, a photocopy shall be considered the original document, and all persons may rely on the same for all purposes.

ARTICLE XIX SIGNATURE AUTHORITY

Except as to matters vested exclusively in one or the other trustee, when there are co-trustees, the action of all the trustees in office shall be required in order to act in any matter affecting the trust; provided, however, that except as to matters vested exclusively in one or the other trustee, the trustees may agree between or among themselves and may authorize and delegate any one or more of the trustees, either individually or in concert, to exercise the powers provided for in this trust.

ARTICLE XX NAME OF TRUST

The name of the trust established herein shall be THE JANETTE KNUDSON SPECIAL NEEDS TRUST.

IN WITNESS WHEREOF, the undersigned hereby approve and execute this Agreement on the dates hereafter specified.

Dated: 3/24/97 /s/ Louise R. Curinga
LOUISE CURINGA,
Trustee

Dated: _____
Judge of the Superior Court

APPROVAL OF JANETTE KNUDSON

I have read this trust. I understand that if it is approved by the Court, I will lose the right to manage the settlement monies in this case myself. A trustee will hold the money for me. I will not be able to tell the trustee what to do or control the distribution of the money.

Having been so informed, I hereby consent to my settlement money being placed in this Trust and held under the terms of the Trust.

Dated: 3/24/97 /s/ Janette Knudson
JANETTE KNUDSON

JEFFREY S. POP & ASSOCIATES
Jeffrey S. Pop, Esq. – State Bar #054343
9107 Wilshire Boulevard
Suite 600
Beverly Hills, California 90210
(310) 273-5462 ♦ (310) 274-7749 (Fax)

Attorneys for Plaintiff
JANETTTE KNUDSON

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES –
NORTHWEST DISTRICT**

JANETTE KNUDSON, an individual; ERIC KNUDSON; an individual; Plaintiffs, v. HYUNDAI MOTORS OF AMERICA, INC.; A California Corporation; GALPIN MOTORS, INC.; a California Corporation; HYUNDAI MOTOR COMPANY, a Korea corporation; and DOES 2 through 100, Inclusive, Defendants.	Case No. LC022329 ~~[PROPOSED]~~ **ORDER APPROVING SETTLEMENT AND PETITION DIRECTING THE NET MONIES TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (*PROBATE CODE* §** 3111) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDI-CAL AND OTHER DISPUTED CREDITORS DATE: July 23, 1997 TIME: 9:00 a.m. DEPT: Z (Filed July 23, 1997)
LOUISE CURINGA, Petitioner and Trustee of The Janette Knudson Special Needs Trust	

THE HONORABLE MICHAEL FARRELL, Judge of the Superior Court, upon review of the papers including the United States District Court OSC RE: Remand, Order RE: Oral Argument, Order Granting Plaintiffs' Motion to Remand, Order Remanding Action to Los Angeles Superior court and Order Denying Plaintiffs' *Ex Parte* Application for Temporary Restraining Order issued by Honorable James M. Ideman, United States District Judge, and after finding the Notice of the Requirements for the Establishment of the Janette Knudson special Needs Trust have been met and that the Special Needs Trust proposed is authorized pursuant to *Probate Code* § 3604 and upon review of the Petition, Memorandum of Points and Authorities, Declarations of Janette Knudson and Jeffrey S. Pop, Petitioner's attorney, upon review of all papers and exhibits filed herein including the Conditional Release of All Claims as executed on March 14, 1997, and upon all of the evidence submitted and after considering oral arguments or statements made to the Court herein enters the following Order.

WHEREUPON, this Court finds and orders that:

1. The Janette Knudson Special Needs Trust dated March 23, 1997 is hereby approved and shall be established and administered in accordance with its terms and conditions. A true copy of such Trust is attached as Exhibit 1 to the Petition filed originally for the hearing dated April 23, 1997;

2. The Court specifically finds that Janette Knudson has special needs as defined in the *Probate Code* § 3604 *et seq.* and that the disbursement to The Janette Knudson Special Needs Trust as set forth in paragraph four (4)

herein is substantially less than the present value of the future medical expenses of Janette Knudson as established by evidence set forth in Exhibits 3, 4, and 5 attached to the Petition filed herein;

3. The settlement of the underlying case entitled *Knudson v. Hyundai Motor Company* Case number LC022329 is hereby approved and upon the funding of The Special Needs Trust and the additional disbursement ordered herein;

4. The settlement proceeds of the Six Hundred Fifty Thousand Dollars ($650,000.00) shall be distributed within Twenty-One (21) days of this Order as follows:

(1) One check or draft made payable to The Janette Knudson Special Needs Trust: $260,015.88;

(2) Medi-Cal lien: $2,729.42 pursuant to its July 21, 1997 request as set forth in the Supplemental Declaration of Jeffrey S. Pop, Esq.;

(3) Great West Life and Annuity Insurance Company: $13,828.70 based on its claim for reimbursement of its *pro rata* share of past medical expenses by this settlement;

(4) Jeffrey S. Pop & Associates A Law Corporation (reimbursement for costs and attorneys fees): $373,426.00.

5. This settlement is a compromise of a disputed, highly complex product liability claim. Based upon the evidence submitted herein it is uncertain that Plaintiff Knudson would have prevailed on this claim although there is a substantial economic risk for all parties if this matter proceeded to trial.

6. This Court has considered the denial of the Temporary Restraining Order of the United States District Court Judge Ideman in the case styled *Great West v. Janette Knudson, et al.* Case number CV 97-3745 JMI (JGx). The allocation of the net settlement proceeds for Plaintiff's loss, injuries and damages as set forth in the Conditional Release of All Claims in Exhibit 2 attached to the Petition was as follows:

Past Loss of Earnings and Present Value of Future Loss of Earnings:	5%
Past Medical Expense:	5%
Present Value of Future Medical Expense:	45%
Lifetime Housing, Transportation, Modifications and Accessories:	5%
Loss of Enjoyment of Life, Distress, Long Term Disability:	40%
	100%

This allocation is fair and it is approved. In making this finding, this Court has considered the evidence of the present value of future medical expenses and the present value of the future loss of earnings. (Exhibit 3)

The present value of future medical expenses are estimated to be in excess of Two Million Five Hundred Ninety-Three Thousand Nine Hundred Dollars ($2,593,900.00). (Exhibits 3, 4 and 5)

The total loss of earning for Plaintiff Knudson is Eight Hundred Nineteen Thousand Eight Hundred Twenty-Nine Dollars ($819,829.00). (Exhibit 3)

In this regard, Forty-Five Percent (45%) of the net settlement figure (rounded) to satisfy the present value of future medical expenses equals One Hundred Seventeen Thousand Two Hundred Dollars ($117,200.00) which is only 4.1% of the cost of the present value of future medical expenses. The reimbursement percentage allocated to Great West for past medical expenses amounts to approximately 3.3% of the total post expenditure of Great West Life and Annuity Insurance Company. Similarly, the amount allocated to the total loss of earnings is only approximately 1.6% of the total loss allocated for this damage. These relationships demonstrate that Great West has been provided a proper percentage of the settlement for the portion of reimbursement for past medical expenses actually recovered.

The Health Insurance Policy under which the initial medical benefits were paid for Janette Knudson has been reviewed. (Exhibit 11) In this matter, the Court finds that the reimbursement to Great West is limited to the amount of the net settlement received for reimbursement of past medical expenses. The percentage of damages attributable to past medical expenses are fair and proper as established in the Conditional Release of All Claims between the parties. (Exhibit 2)

7. The attorney fees have been reduced from a contractual Forty Percent (40%) contingency to Thirty-Three and One Third Percent (33 1/3%) contingency although considerable discovery, vehicle testing, seat belt testing including the employment of eleven (11) expert witnesses have occurred. The cost advanced was necessary to procure this compromise result for Plaintiff Janette Knudson.

Based upon the evidence presented, the fact that all parties and interested persons were served with the Petition and Motion, the attorney fees and costs as requested in the Petition are hereby approved.

8. The disbursements, as approved in Paragraph 4, shall be paid by Two (2) checks, one made payable to The Janette Knudson Special Needs Trust in the amount of Two Hundred Sixty Thousand Fifteen Dollars and Eighty-Eight Cents ($260,015.88). The second for the remainder in the sum of Three Hundred Eighty-Nine Thousand Nine Hundred Eighty-Four Dollars and Twelve Cents ($389,984.12) made payable to Jeffrey S. Pop & Associates A Law corporation, Client Trust Account. Upon receipt and credit of the funds, the law firm of Jeffrey S. Pop & Associates is hereby ordered to tender a clients trust account checks to DHS/Personal Injury (Medi-Cal) and to Great West Life and Annuity Insurance Company in the amounts as set forth in paragraph 4 above.

9. It is further Ordered that upon receipt of such funds, the Petitioner and through attorney of record shall deliver a Dismissal with Prejudice to Defendant's attorney for filing with this Court.

The foregoing is so Ordered.

Date: JUL 23 1997 MICHAEL J. FARRELL
Judge of the Superior Court

[Proof Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV 97-3745 JMI (JGx)
[Caption Omitted In Printing]

I.

PETITION FOR ORDER

DIRECTING THE NET MONEY TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (PROBATE CODE § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT TO MEDI-CAL AND OTHER DISPUTED CREDITORS

PETITIONER Louise Curinga Trustee of The Janette Knudson Special Needs Trust and Plaintiff Janette Knudson respectfully allege:

1. Petitioner, Louise Curinga, is a long term friend of Plaintiff Janette Knudson and has agreed to be the Trustee of the Janette Knudson's Special Needs Trust, a true copy of which is attached hereto and incorporated herein as Exhibit 1.

2. The Plaintiff is Janette Knudson is a Thirty-Nine (39) year old female born on October 31, 1958. Janette Knudson sustained a catastrophic spinal cord injury on June 10, 1992 when the vehicle she was driving, a 1991 Hyundai Excel, that went off the road and rolled over several times. Janette Knudson was immediately rendered a quadriplegic suffering a C6-C7 spinal cord injury.

3. ***COMPROMISE OF DISPUTED CLAIM*** The proposed settlement is a compromise of a disputed claim.

Plaintiff has alleged design defects with respect to both the roof structure and the seat belt design incorporated in the 1991 Hyundai Excel which Janette Knudson was driving. Defendant Hyundai vigorously denies any such defect. As set forth in the Declaration of Jeffrey S. Pop, attached hereto the incident occurred on June 10, 1992 when Janette Knudson was driving her 1991 Hyundai Excel down Interstate 5. Also riding in the 1991 Hyundai Excel in the front right passenger seat was her husband, Eric, in the rear seats were two (2) adult female friends and in the rear middle in a baby seat was Janette's two (2) year old daughter Jenna. The 1991 Hyundai Excel was southbound on Interstate 5 travelling at approximately Seventy-Five Miles Per Hour (75 MPH). After the vehicle passed by a large tractor trailer, it swayed and drifted to the left. Plaintiff attempted to redirect the 1991 Excel toward the right. She lost control of the vehicle which continued in a centrifical skid across the highway and off into the right shoulder. The 1991 Hyundai Excel travelled approximately one hundred (100) feet in the soft dirt when it began to rollover with the passenger side down first.

The parties dispute whether the vehicle rolled over as few as two (2) times or as many as four (4) times. During the rollover event, the adult female passengers who were in the back of the vehicle were not wearing their seat belts, were ejected. One of the passengers subsequently died. Plaintiff Janette Knudson, the driver, who had properly worn her seat belt, was rendered a quadriplegic.

Plaintiff contends that the side rail of the roof between the "A" and "B" pilar moved inward and downward at the same time that her seat belt allowed slack so that Plaintiff in effect involuntarily dove down on the roof of the vehicle as it was upside down thereby sustaining her spinal cord injury.

Defendant denies these allegations and stresses that the vehicle rolled over four (4) times in a violent manner at a high speed. Defendant further contends that Plaintiff's head may have gone through the left window after it broke and that her head may have contacted the ground rather than the roof.

Defendant contends that credible evidence exists that at the time plaintiff lost control that her husband grabbed the wheel making the vehicle uncontrollable. In the alternative, Defendant states that Plaintiff Janette Knudson over-corrected by turning the steering wheel too much thereby causing loss of control and the centrifical skid.

Plaintiff disputes these factual allegations.

4. ***SETTLEMENT NEGOTIATED*** A Conditional Release of All Claims has been negotiated between the parties. A true copy of which is attached hereto as Exhibit 2. The gross amount payable to The Special Needs Trust Janette Knudson and to her attorney of record Jeffrey S. Pop & Associates, a Law Corporation to cover attorney fees, costs, Medi-Cal liens and any additional funds to found to be owed on legally perfected or compromised claims in the amount of Six Hundred Fifty Thousand Dollars ($650,000.00). This case can settle only if The Janette Knudson's Special Needs Trust is approved by the Court. As set forth herein, Janette's present value costs of

the future medical expenses alone is in excess of Two Million Five Hundred Thousand Dollars ($2,500,000.00). Attached hereto as Exhibit 3 is a Report from Economist, Robert Johnson, estimating the future medical costs of the beneficiary.

5. The rehabilitation care costs report has been prepared by Gerry Aster, R.N., M.S., C.R.C., Rehabilitation Consultant, estimating and projecting the annual cost of medical, in-home services, related services, supplies and equipment for Janette Knudson who will need lifetime care and lifetime attendant assistance. A true and correct copy of this Report is attached hereto as Exhibit 4.

6. Attached hereto is Exhibit 5 and incorporated herein. A Report dated January 18, 1996 by Dr. Thomas L. Hedge discusses the medical examination and condition of Janette Knudson which by its terms qualifies Janette Knudson as having a substantial physical handicap which qualifies her for a Special Needs Trust. A true and correct copy of which is attached hereto as Exhibit 5.

7. Both Dr. Hedge and Gerry Aster, R.N. indicate that Janette Knudson will require ongoing services for the remainder of her life, specialized services including neurologist, orthopedist, occupational and physical therapist, an electric wheelchair, adjustable bed, accessibility devices if/and respatory equipment specialized further orthodox medical and paramedical service as well as attendant care to Plaintiff. It will be necessary for her to have a specially equipped and adapted passenger van for driving. All of these are special needs as defined in the *Probate Code* § 3604(b)(1)(2)(3).

8. ***THE JANETTE KNUDSON'S SPECIAL NEEDS TRUST*** Petitioner is seeking by this Petition to have the settlement amount payable either into an annuity payable in monthly amounts to The Janette Knudson's Special Needs Trust or in a settlement amount directly deposited into the Janette Knudson's Special Needs Trust account under the Court's discretionary authority as set forth in *Probate Code* § 3600 *et seq*. Such procedure requires, among other things, that Notice of the time and place of the hearing of the Petitioner be given to the State Director of Health Services, the State Director of Mental Health and the State Director of Developmental Services[1] *Probate Code* § 3602(f) as well as the Court finding:

1) That Plaintiff has disabilities that substantially impairs her ability to provide for her own care and custody which constitutes the substantial handicap; 2) That Plaintiff is likely to have special needs that will not be met without the Trust; 3) That the money to be paid to the Trust does not exceed the amount that appears reasonably necessary to meet the special needs of Plaintiff; and 4) That all statutory liens in favor of the State Department of Health Service, the State Department of Mental Health, the State Department of Developmental Services have been satisfied pursuant to *Probate Code* § 3604. It is also important that the Court determine the rights, if any,

---

[1] Plaintiff and Petitioner has given the statutory Notice of Hearing as set forth in *Probate Code* § 3602(f). The proof of service is attached hereto. The Janette Knudson Special Needs Trust (Exhibit 1) was copied separately for review by these agencies.

regarding private health providers who have not perfected any alleged lien rights and/or the amount disputed owed to those who have perfected their rights.

9. ***THE FUNCTIONING OF THE JANETTE KNUDSON'S SPECIAL NEEDS TRUST*** The Janette Knudson's Special Needs Trust is a form of Trust which is designed to continue Plaintiff's eligibility for Medi-Cal, supplemental Social Security Income (SSI) and other benefits which she is and may be eligible in which are necessary for the treatment of her injuries and the furnishing of proper care.

Under the terms of the Trust, the Trustee is authorized to pay or apply for the Plaintiff's benefit as much of the Trust Estate as the Trustee considers necessary or advisable for Plaintiff special needs. (Exhibit 1)

A "special need" is defined as any requirement for maintaining Plaintiff's good health, safety and welfare when such requisite is not available from any public agency, office or department. The purpose of the Trust is a supplement not a supplant to Medi-Cal and other programs of benefits. This purpose is set forth in the Trust which has been served upon the representative of Medi-Cal through the State Department of Health Services, State Department of Mental Health and the State Department of Developmental Services.

Louise Curinga, the Petitioner's long time friend is names ad [sic] the initial Trustee of the Trust. If she is unable to serve, successors have been also named.

Notwithstanding this designation of a Successor Trustee to Louise Curinga, the Trust Agreement provides

that Janette Knudson would have the power to name different Successor Trustee if she wishes under the terms of Article IV. (Exhibit 1)

The Trustee just submit annual accountings to a "Beneficiary's Representative." If the Beneficiary's Representative fails to object to the accounting within Thirty (30) days after its receipt, it shall be conclusively deemed approved.

If the Beneficiary's Representative objects to the accounting and the objection cannot be resolved informally, then the Trustee must submit the accounting to the Court for Court review and approval.

The purpose of these provisions is to avoid the delay and expense of annual accountings to the Court while building in safeguards to insure that the Trust will be properly managed.

10. ***DISBURSEMENT ON BENEFICIARY'S DEATH*** On Janette Knudson's death, the Trust would terminate at which time the Trustee must notify any and all state agencies which have provided services or benefits to the Beneficiary. Pursuant to *Probate Code* § 3605(c), such agencies may submit claims for reimbursement for any services and equipment provided during the term of the Trust. In addition, the State Department of Health Services is specifically authorized to be reimbursed for any Medi-Cal benefits received by the Plaintiff after establishment of the Trust.

Any assets remaining in the Trust after satisfaction of the claims of public agencies shall be distributed as the Beneficiary may direct in her will. If the Beneficiary fails

to execute a will directing disposition of the balance of the Trust, the Trust assets shall be distributed to Janette Knudson's "heirs at law, Jenna Knudson, the minor, her daughter and then to their identities and respective shares to be determined in accordance with the laws of California then in effect governing the succession of separate property not acquired from a predeceased spouse." This is the language that governs the distribution of the property her persons who die without a will.

A copy of the Trust is attached hereto as Exhibit 1 and is incorporated in its entirety by this reference.

11. ***CRITERIA FOR APPROVAL*** All money payable to the Plaintiff in this matter should be paid to the Janette Knudson Special Needs Trust for the following reasons:

(a) As noted above, the Plaintiff is a C6-C7 quadriplegic who is unable to get dressed, get out of bed or care for herself without daily attendant care.

(b) The Plaintiff is likely to have special needs that will not be met without the Trust. Although Medi-Cal currently pays for a portion of the Plaintiff's medical needs, equipment and supplies, and care, no public agency or other source will provide for her non-medical needs, such as special equipment, assistive devices, physical and occupational therapy, specially adapted motor vehicle, residence and additional attendants. The cost of these services, which is substantial, must be paid by the Trust.

(c) The money to be paid to the Trust does not exceed the amount that appears reasonably necessary to meet the Plaintiff's special needs. In light of the Plaintiff's needs for supplemental

services and equipment, sum of Six Hundred Fifty Thousand Dollars ($650,000.00) less attorney fees and costs and Medi-Cal lien and other liens, if any, as indicated in Paragraph 13 below is very moderate. It is clear that the Trust assets will be fully utilized to pay for Janette Knudson's supplemental needs.

12. ***NOTICE REQUIREMENTS*** The agencies required to receive notice of this Petition are as follows:

Department of Health Services
Special Needs Trusts
P.O. Box 225
Sacramento, CA 95814-0225
(916) 323-0164 (phone)
(916) 322-8778 (fax)
Attention: Georgene Craven
Department of Development Services
1600 Ninth Street, Room 240
Sacramento, CA 95814

Department of Mental Health
1600 Ninth Street, Room 151
Sacramento, CA 95814

13. ***SETTLEMENT AGREEMENT*** The parties have entered into a conditional Settlement Agreement and Release of All Claims, a true copy of which is attached hereto as Exhibit 2 which incorporated by this reference herein. This Conditional Release calls for Defendants to pay a total of Six Hundred Fifty Thousand Dollars ($650,000.00) to Plaintiff and to her attorneys of record for complete release provided that The Special Needs Trust is approved. Under the terms of the conditional release of all claims, the monies are paid for Plaintiff injuries after attorney fees and costs are apportioned as follows:

Past Loss of Earnings and Present Value of Future Loss of Earnings:	5%
Past Medical Expense:	5%
Present Value of Future Medical Expense:	45%
Lifetime Housing, Transportation, Modifications and Accessories:	5%
Loss of Enjoyment of Life, Distress, Long Term Disability:	40%
	100%

In the event that the above apportionment is approved, then the total amount to be funded to The Janette Knudson's Special Needs Trust will be determined after deduction of attorney fees, costs, medical liens and finally the disputed claim of Great West as set forth in Paragraph 14 below.

14. *GREAT WEST ALLEGED CLAIM*

(a) A dispute exists with respect to an asserted claim by Great West Life and Annuity Insurance Company. Great West is asserting a claim under a group health insurance policy which was in effect at the time of Janette Knudson's injury on June 10, 1992. The policy covered Eric Knudson and his dependents.

(b) The Declaration of Jeffrey S. Pop indicates that he recently discovered the terms and condition of the underlying policy. Plaintiff's attorney until recently was unaware of the limiting nature of the policy language as compared to the enormous claim being asserted by Great West. Great West is requesting an amount which is not in

accordance with the terms of its policy. Great West has never obtained a lien signed by Plaintiff Janette Knudson. In addition, Great West did not file a Complaint in Intervention. Great West is not a judgment creditor and it has never filed a lien notice in this litigation.

(c) Great West is attempting to claim a right to first recovery on any monies recovered. This contradicts rights set forth in the Group Medical Insurance Policy that was in effect at the time of the accident. A true and correct copy of the group insurance policy that apparently was in effect is filed separately; however, the relevant pages are attached herewith as Exhibit 6 and incorporated by this reference herein. The relevant portion of that policy on page IV-7 states:

"This lien will not exceed:

- the amount of benefits paid under this Booklet for the treatment of the loss; or
- the amount received by the Covered Person for such medical treatment from the third party."

(Exhibit 6)

(d) In this case, the Conditional Settlement Agreement clearly indicates that the Janette Knudson Special Needs Trust is receiving Five Percent (5%) of the net settlement for past medical expenses. The majority of the monies to be paid by Defendant are properly allocated to avoid the exposure for future medical expenses, future loss of earnings, past loss of earnings, loss of enjoyment of life and of course, long term disability and distress.

The Group Health Policy for right of recover is limited by its terms.

(e) As indicated in the Declaration of Janette Knudson attached hereto and incorporated by this reference herein, Eric Knudson and Janette have been separated since the time of the tragic injury. At no time did Janette Knudson sign any claim of lien or has any attorney who represented Janette Knudson ever signed any claim of lien. No extraordinary and additional services were rendered by any healthcare provider.

(f) The Declaration of Jeffrey S. Pop as well as the Proof of Service attached hereto indicates that Notice is being given to Great West so that all disbursements and a total settlement can be approved at one time in order to dismiss this litigation and have the Special Needs Trust correctly funded in accordance with this Petition. A Supplemental Points and Authorities is being presented to the Court in support of Plaintiff and Petitioner's position herein.

15. In accordance with the finding of the establishment of The Janette Knudson Special Needs Trust, the Trust should be funded in the net amount of Two Hundred Fifty-Six Thousand Seven Hundred Forty-Five Dollars and Thirty Cents ($256,745.30).

The calculation for such funding is as follows:

Gross Settlement Amount:		$650,000.00
Attorney's Fees (Reduced to 33 1/3%):	$216,666.00	
Costs Advanced (Previously Itemized to Trustee and Beneficiary:	$161,760.00	
Total Attorney's Fees & Costs:		($373,426.00)
Settlement After Fees & Costs:		$276,574.00
Medi-Cal Lien Gross (Exhibit 7 – 3/19/97 Letter):	$ 1,106.41	
Reserve Medi-Cal:	$ 3,893.59	
Total Medi-Cal:	$ 5,000.00	
Amount Brought Forward:		$276,574.00
Great West Recovery[2] 5% Allocated to Past Medical Fees & Costs:	$ 13,828.70	

[2] The Great West claim has been asserted by letter but has not been perfected. The total medical expenses according to Great West are Four Hundred Eleven Thousand One Hundred Fifty-Seven Dollars and Eleven Cents ($411,157.11). The policy language limits recovery, if any, in this case. There is an argument, no recovery is permitted since no lien has been filed or signed by the Beneficiary, Janette Knudson. No services were rendered due to any lien or promise of Janette Knudson. The recovery offer by way of compromise has been limited to the Group Policy language under proper interpretation in this case. See accompanying Points and Authorities file concurrently herewith.

Total Medical Re-Payments:	($ 18,826.70)
Net to Amount be Funded [sic] to The Janette Knudson Special Needs Trust:	$256,745.30

WHEREFORE, Petition prays that the Court makes the following findings and orders:

1. That all Notice has been given as required by law;

2. That Plaintiff Janette Knudson has a disability that substantially impairs her ability to provide for her own care and constitutes a substantial handicap;

3. That Plaintiff Janette Knudson is likely to have special needs that will not be met without the Trust;

4. That the money to be paid to the Trust does not exceed the amount that appears reasonably necessary to meet the special needs of Plaintiff Janette Knudson;

5. That the payment of all monies due Plaintiff under the compromise shall be paid to the Louise Curinga in the amount of the Janette Knudson's Special Needs Trust;

6. That all statutory liens in favor of the State Department of Health Services, State Department of Mental Health and State Department of Developmental Services in any county or city in the state shall first be satisfied and they are in the amount not to exceed Five Thousand Dollars ($5,000.00) before any money is paid to the Trust;

7. That the assets of the Trust estate are unavailable to the Beneficiary and shall not constitute a resource for

the Plaintiff Janette Knudson's eligibility for Medi-Cal, Supplemental Security Income (SSI), regional center assistance or any other program of public benefits;

8. That the law offices of Jeffrey S. Pop, A Law Corporation disburse to Medi-Cal, a check in the amount not to exceed Five Thousand Dollars ($5,000.00) to cover its statutory liens and a check in the amount Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70) made payable to Great West Life and Annuity Insurance Company to total settlement and compromise of any claims under the medical lien.

9. That attorney fees in the amount of Two Hundred Sixteen Thousand Six Hundred Sixty-Six Dollars ($216,666.00) and costs in the amount of One Hundred Six-One Thousand Seven Hundred Sixty Dollars ($161,760.00) be awarded to Jeffrey S. Pop & Associates, A Law Corporation in accordance with his Contingency Fee Agreement which has been reduced in order to make this settlement possible.

10. The net funds equals to the amount Two Hundred Fifty-Six Thousand Seven Hundred Forty-Five and Thirty Cents ($256,745.30) be paid directly into the Janette Knudson's Special Needs Trust or in the alternative, to an annuity which will pay as its investment sums to the Janette Knudson's Special Needs Trust;

11. That any such other and further orders be issued by the Court as it may deemed just and proper.

II.

CONCLUSION

The foregoing Petition and Compromise of disputed claim allowing for the establishment of The Janette Knudson Special Needs Trust should be approved, this matter settled in order to avoid a Four (4) week jury trial.

Respectfully Submitted.

Dated: 3/24/97 /s/ Louise R. Caringa
/s/ Louise R. Caringa, Petitioner

Dated: 3/24/97 JEFFREY S. POP & ASSOCIATES
A LAW CORPORATION

BY: /s/ Jeffrey S. Pop
Jeffrey S. Pop, Esq.
Attorneys for Plaintiff,
JANETTE KNUDSON

VERIFICATION

I, the undersigned, state:

I am the Petitioner herein. The within Petition is true of my own knowledge, except for matters involving the disputed claims of Great West and for those matters stated on my information and belief, and as to those matters I believe them to be true.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3-24-97 day of _____, 1997, at Chatsworth, California.

/s/ Louise Curinga
Louise Curinga

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV 97-3745 JMI (JGx)
[Caption Omitted In Printing]

CONDITIONAL RELEASE OF ALL CLAIMS

In consideration of receipt of Six Hundred Fifty Thousand Dollars ($650,000.00) payable to both the Janette Knudson Special Needs Trust and separately to her attorney of record, Jeffrey S. Pop a Law Corporation Client's Trust Account in a total amount of Six Hundred Fifty Thousand Dollars ($650,000.00) less attorney fees of Thirty-Three and One-Third Percent (33 1/3%) and costs the remainder as apportioned as payment for the specified type of damages and shall be paid to Medi-Cal, other Government services and/or valid and legally perfected lienholders as Ordered by the Court and the remainder to the Janette Knudson's Special Needs Trust.

The Defendants have agreed to pay the above referenced sum of money to settle this disputed and vigorously defended claim. The payment is allocated as partial compensation for Plaintiff due to her catastrophic losses after the deduction of attorney's fees and costs as follows:

Past Loss of Earnings and Present Value of Future Loss of Earnings:	5%
Past Medical Expense:	5%
Present Value of Future Medical Expense:	45%
Lifetime Housing, Transportation, Modifications and Accessories:	5%
Loss of Enjoyment of Life, Distress, Long Term Disability:	40%
	100%

The foregoing settlement and effectiveness of this Release is contingent upon the Court approving the Janette Knudson's Special Needs Trust in order to continue Plaintiff's eligibility for Social Services, Social Security Income (SSI) and all other government benefits currently available to Plaintiff.

Upon approval of the Janette Knudson's Special Needs Trust and the settlement, Janette Knudson being of lawful age, does hereby release, acquit and forever discharge HYUNDAI MOTORS OF AMERICA, INC., A California Corporation; GALPIN MOTORS, INC., A California Corporation; HYUNDAI MOTOR COMPANY, A Korea Corporation and all of their employees, agents, personal representatives, attorneys, successors or predecessors in interest, insurance companies, insurance adjusters, insurance agents and brokers (hereinafter collectively designated as the "Releasees") of and from any and all actions, causes of actions, claims, demands, damages, costs, loss of services, expenses and compensation, on account of, or in any way growing out of, any and all known and unknown personal injuries, property damage and intangible damage resulting or to result from or by reason of the conduct of releases occurring at any time prior hereto, the facts of which, in part, are set forth in that certain lawsuit filed in the Superior Court of the State of California, Los Angeles County, Northwest District, entitled, Janette Knudson, *et al.*, Plaintiff, vs. Hyundai Motor Company, *et al.* and Does 2 through 100, Defendant, Case Number LC022329.

WARNING

1. All persons signing this release must read and understand it in its entirety and truly intend to terminate, irrevocably, all their rights to further pursue or prosecute their causes of action, demands or claims against the described Releasees. In particular, please note:

A. The extensive description of the persons released. Some of the persons released are not parties to the lawsuit or arbitration proceeding to be dismissed, but nevertheless your dismissal of them is required as a necessary part of the settlement evidenced by this release.

B. You are waiving all rights under Section 1542 of the California Civil Code, which provides as follows: "CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE – A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which, if known by him, must have materially affected his settlement with debtor."

2. IN ADDITION TO THE FOREGOING, PLEASE NOTE THE FOLLOWING FURTHER PROVISIONS OF THIS RELEASE AND THE SETTLEMENT IT EVIDENCES:

A. I hereby declare and represent that the injuries or damages are permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this release and agreement it is understood and agreed that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries, and that I have not been influenced by any extent whatever in making this

release by any representations or statements regarding said injuries, damages or any other matters, made by the persons firms or corporations who are hereby released, or by any person or persons representing them, or by any physicians or surgeons employed by them.

B. I hereby declare and represent that I am effecting this settlement and executing this release after having received full legal advice as to my rights from my attorney.

C. I hereby authorize and direct my attorney of record to forthwith dismiss with prejudice the aforementioned lawsuit or arbitration proceeding as against the Releasees.

D. I declare that the incident, accident, injuries or damages above-described did not arise out of or in the course of my employment and that I received no benefits under any workers' compensation act by reasons of said incident, accident, injuries or damages and am not entitled thereto.

E. It is further understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of said Releasees, by whom liability is expressly denied.

F. This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual.

G. I agree to reimburse and indemnify all released parties for any amounts not adjudicated by the Court in settlement which any insurance carriers, government entities, hospitals or other persons or organizations may

recover from them in legal and perfected liens for reimbursement for amounts paid to me or on my behalf as a result of this accident by way of contribution, subrogation, indemnity, or otherwise.

FOR YOUR PROTECTION CALIFORNIA LAW REQUIRES THE FOLLOWING TO APPEAR ON THIS FORM:

"IT IS UNLAWFUL TO:

(A) PRESENT OR CAUSE TO BE PRESENTED ANY FALSE OR FRAUDULENT CLAIM FOR THE PAYMENT OF A LOSS UNDER A CONTRACT OF INSURANCE.

(B) PREPARE, MAKE, OR SUBSCRIBE ANY WRITING, WITH INTENT TO PRESENT OR USE THE SAME, OR TO ALLOW IT TO BE PRESENTED OR USED IN SUPPORT OF ANY SUCH CLAIM. EVERY PERSON WHO VIOLATES ANY PROVISION OF THIS SECTION IS PUNISHABLE BY IMPRISONMENT IN THE STATE PRISON NOT EXCEEDING THREE YEARS, OR BY FINE NOT EXCEEDING ONE THOUSAND DOLLARS, OR BY BOTH."

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Signed, sealed and delivered this 14th day of March, 1997, at [Illegible] California.

/s/ Janette Knudson
JANETTE KNUDSON

The foregoing signature of Janette Knudson has been witnessed by Jeffrey S. Pop, Attorney at Law, who has

explained the effect of this Condition Release of All Claims. The foregoing was signed in my presence.

DATED: 3/14/97

/s/ Jeffrey S. Pop
JEFFREY S. POP, ESQ.

Thomas L. Henderson, TN Bar No. 11526
Thomas H. Lawrence, TN Bar No. 17105
McKNIGHT HUDSON LEWIS/FORD & HARRISON LLP
6750 Poplar Ave., Suite 301
P.O. Box 171375
Memphis, Tennessee 38183
(901) 756-1550

Linda Claxton Johnson, CA State Bar No. 125729
FORD & HARRISON LLP
333 South Grand Avenue
Suite 3680
Los Angeles, California 90071
(213) 680-3410

Attorneys for Great-West Life
and Annuity Insurance Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Plaintiffs, v. HYUNDAI MOTORS OF AMERICA, INC.; A California Corporation; GALPIN MOTORS, INC.; a California Corporation; HYUNDAI MOTOR COMPANY, a Korean Corporation; and DOES 2 through 100, inclusive, Defendants.	) CIVIL ACTION) NO.: 97-2801JMI)) **NOTICE OF REMOVAL**

Defendant, Great-West Life & Annuity Insurance Co. ("Great-West"), hereby removes this action to this Court pursuant to 28 U.S.C. § 1441(a) and (c), and in support thereof, states as follows:

1. On March 28, 1997, Great-West was served with copies of a Notice of Motion and Motion, Memorandum in Support, and Proposed Order styled *Janette Knudson, et al. v. Hyundai Motors of America, Inc., et al.*, No. LC022329 in the Superior Court of California for the County of Los Angeles – Northwest District. A copy of the foregoing documents is attached hereto as Exhibit A and constitutes all pleadings, process and other documents served upon Defendant Great-West in this action. These documents were the initial pleadings served upon Defendant Great-West setting forth the claim upon which such action or procedure is based.

2. This action is removable pursuant to 28 U.S.C. §§ 1331 and 1441. Plaintiff asserts claims which raise substantial questions of federal law and which arise out of federal law. Plaintiff asserts a claim for a determination that the Health and Welfare Plan for Employees of Earth Systems, Inc. (the "Plan") is not entitled to enforce the subrogation provisions of its self-funded employee benefit plan against the monies Plaintiff is about to receive in settlement of her state court lawsuit. Plaintiff's claims relate to benefits she received under the Plan, an employee benefit plan as defined and described in 29 U.S.C. § 1002(1) and 1003(a). Plaintiff received benefits under the Plan totaling $411,157.00.

3. Great-West is a Colorado corporation and is the assignee for collection of the Plan for the purpose of

prosecuting all rights and claims for reimbursement or subrogation.

4. Plaintiff's claims further relate to the employee benefit plan within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and are preempted and superseded by 29 U.S.C. § 1144(a).

5. This action is removable pursuant to the complete preemption doctrine without regard to the well-pleaded complaint rule. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

6. This Court has original jurisdiction of ERISA actions under 29 U.S.C. § 1132(e). This action is founded on claims or rights arising under the laws of the United States in that it is based upon and requires the application of ERISA, 29 U.S.C. § 1144(a). Removal jurisdiction exists under 28 U.S.C. § 1441(b) and (c). *Fravel v. Stankus*, 936 F. Supp. 474 (N.D. Ill. 1996).

7. Plaintiff's claim against Great-West is separate and distinct from the Plaintiff's claims against the other co-defendants. Therefore, this entire action is removable pursuant to 28 U.S.C. § 1441(c).

8. Because removal is proper under 28 U.S.C. § 1441(c), not all defendants are required to join in this notice of removal. *Fravel v. Stankus*, 936 F. Supp. 474 (N.D. Ill. 1996).

9. This notice of removal was timely filed pursuant to 28 U.S.C. § 1446(b) having been filed within 30 days after service of Exhibit A.

10. Venue is proper in this Court.

11. Pursuant to 28 U.S.C. § 1446(d), Great-West will promptly give written notice of the removal of this action to all parties and file a copy of this notice with the state court.

WHEREFORE, Great-West removes this action to this Court.

DATED: April 21, 1997

Respectfully submitted,

FORD & HARRISON LLP

By: /s/ Linda Claxton Johnson
Linda Claxton Johnson

McKNIGHT HUDSON LEWIS/
FORD & HARRISON LLP

By: /s/ Thomas L. Henderson
Thomas L. Henderson

By: /s/ Thomas H. Lawrence
Thomas H. Lawrence

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JANETTE KNUDSON, et al., Plaintiffs, v. HYUNDAI MOTORS OF AMERICA, INC., et al., Defendants.	CV-97-2801-JMI (ANx) **ORDER GRANTING PLAINTIFFS' MOTION TO REMAND** **ORDER REMANDING ACTION TO LOS ANGELES SUPERIOR COURT** (Filed Jun. 30, 1997)

IT IS HEREBY ORDERED:

Plaintiffs Janette Knudson, et al.'s Motion to Remand came before this Court for review on June 2, 1997. After careful consideration and review, the Court hereby GRANTS Plaintiffs' motion.

BACKGROUND

Plaintiff, Janette Knudson, was involved in an automobile accident while driving a car manufactured by Hyundai Motors of America, Inc. Plaintiffs filed suit against Hyundai Motors of America, et al., in the Superior Court of the State of California of the County of Los Angeles. *See Janette Knudson, et al. v. Hyundai Motors of America, Inc., et al.*; Case No. LC022329. The dispute

between Plaintiffs and Hyundai was to be settled by way of the establishment of a trust fund for Plaintiff.

Great-West Life and Annuity Insurance Company ("Great-West") is the assignee of the health insurance company that initially paid Plaintiff's medical expenses following the accident. Great-West, claiming to be a defendant, removed Plaintiffs' case against Hyundai, et al., to federal court before the trust fund could be approved by the state court. Now, Plaintiffs request that the case be remanded back to state court.

DISCUSSION

I. Section 1441 Procedure

Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441. *Accordingly, only a defendant has the power to remove a case to federal court.*

II. Great-West Does Not Qualify as a Defendant Under 28 U.S.C. § 1441

Great-West is a party-in-interest in the instant case to the extent that it hopes to receive compensation from the trust fund for the medical payments it made following Plaintiff's accident. Great-West, however, was never included as a party in *Knudson v. Hyundai*, and it is in no position to qualify itself as a defendant. Not Plaintiffs,

nor any other party in this matter, have made any claims against Great-West. It is Great-West that has a complaint against Plaintiffs. In fact, Great-West has already filed a separate complaint in this court seeking compensation from Plaintiffs. *See Great-West Life & Annuity Ins. Co. v. Janette Knudson, et al.*; CV 97-3745 JMI (JGx).

Plaintiffs have filed a Motion for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors. In the motion, Plaintiffs ask the state court to approve the settlement reached with Hyundai. The proposed settlement includes a provision providing compensation to the parties for past medical expenses. Great-West, however, does not qualify as an adversarial party in the motion. Great-West is only a party-in-interest to the extent that it is to receive compensation from the trust fund as part of the provision providing compensation to parties for past medical expenses. The state court is to decide whether or not the settlement is fair to the parties involved. If the state court finds that the proposed settlement is not fair to Great-West, it will not approve the settlement. Great-West is not in a position to itself oppose Plaintiffs' motion for approval.

III. Great-West Does Not Qualify as a Defendant Under *Fravel v. Stankus*

Great-West claims that it qualifies as a defendant under the holding in *Fravel v. Stankus*, 936 F. Supp 474 (N.D. Ill. 1996), a case from the Northern District of Illinois. In *Fravel*, the injured plaintiff filed a Motion to Adjudicate Lien against a subrogee of a health plan that had made medical payments on behalf of the plaintiff. *Id.*

at 476. The motion was made in connection with a settlement the plaintiff reached with the defendant in the case. The court held that the health plan subrogee qualified as a defendant in the plaintiff's state case because "the action [was] clearly adversarial in nature." *Id.* at 480 (citation omitted).

The holding in *Fravel*, however, does not apply to the instant case. Plaintiffs never filed a Motion to Adjudicate Lien against Great-West. In fact, Plaintiffs dispute Great-West's contention that a lien ever existed. *See* Plaintiffs' Motion, p. 4.

IV. Great-West has Filed a Separate Complaint Against Plaintiff

Plaintiff's Motion to Remand is strengthened by the fact that Great-West has already filed a separate ERISA related complaint against Plaintiffs in federal court seeking compensation for the payments it made relating to Plaintiff's accident. *See Great-West Life & Annuity Ins. Co. v. Janette Knudson, et al.*; CV 97-3745 JMI (JGx). It would be improper to allow Great-West to file a separate complaint against Plaintiffs for compensation and at the same time qualify itself as an adverse party in Plaintiffs' case against Hyundai. Such an outcome would not be in the interests of justice, as Great-West would be seeking compensation for the same expense from two separate sources. By filing a separate federal complaint, Great-West has mooted its argument for removing Plaintiffs' case against Hyundai.

IT IS SO ORDERED.

DATED: June 27, 1997

/s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

[Proof Of Service Omitted In Printing]

Thomas H. Lawrence, TN Bar No. 17105
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
SunTrust Center, Suite 800
424 Church Street
Nashville, TN 75201-7812
(615) 254-1900

Linda Claxton Johnson, CA Bar No. 125729
FORD & HARRISON LLP
333 South Grand Avenue
Suite 3680
Los Angeles, CA 90071
(213) 680-3410

Attorneys for Plaintiffs
Great-West Life & Annuity Insurance Company, The Health and Welfare Plan for Employees of Earth Systems, Inc., and and Earth Systems, Inc., the Plan Administrator for the Health and Welfare Plan for Employees of Earth Systems, Inc.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC. Plaintiffs,	Case No. CV-97-3745 JMI (Jgx) DECLARATION OF JEROL J. BROWN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND FOR PRELIMINARY INJUNCTION

v. JANETTE KNUDSON, and individual; ERIC KNUDSON, an individual, Defendants.	Date: December 29, 1997 Time: 10:00 a.m. Place: Courtroom of the Hon. James M. Ideman (Filed Dec. 8, 1997)

DECLARATION OF JEROL J. BROWN

I, Jerol Brown, declare as follows:

1. I am the Secretary-Treasurer of Earth Systems, Inc. and served as a member of the Board of Trustees of the Earth Systems, Inc. Employee Benefit Trust from 1988 through 1993.[1] The Board of Trustees was designated as the Plan Administrator for the Earth Systems, Inc. Employee Benefit Trust ("The Plan"). I have been employed by Earth Systems since June 1, 1985. My responsibilities as a member of the Board of Trustees included but were not limited to the design, implementation, administration, accounting, and interpretation of health benefits for Earth Systems employees and their dependents. I am familiar with the Plan's policies, procedures and records pertaining to health benefits available to participants of the Plan. I was, as a member of the Plan Administrator, a fiduciary of the Plan based upon being named by the Plan. I exercised discretion in control and management of the Plan. I have personal knowledge

[1] Effective January 1, 1993, Earth Systems, Inc. terminated its employee welfare benefit plan and commenced providing coverage for its employees directly through insurance.

of the facts set forth herein, and if called as a witness in this matter, I could and would testify thereto under oath.

2. Earth Systems, Inc. and its subsidiaries are engaged in commerce or an activity affecting commerce. Earth Systems established and maintained the Plan for the purpose of providing its participants and their dependents, among other benefits, medical, surgical, and hospital care benefits. The Plan was neither a governmental, church or unfunded excess benefit plan. The Plan was not maintained solely for complying with applicable workers' compensation laws or unemployment or disability insurance laws, and was not maintained outside the United States. The Plan was designed to, and did comply with, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). The Plan is an ERISA Plan.

3. Earth Systems self-funded its Plan and was self-funded in providing medical benefits. Earth Systems, at all times relevant, engaged Great-West Life & Annuity Insurance Company ("Great-West") to act as a non-discretionary claims service administrator for the Plan. Great-West's function was, in part, to process claims submitted by Plan participants or their dependents in accordance with the terms of the Plan.

4. Janette Knudson became a participant in the Plan on October 31, 1990 through enrollment as a dependent spouse.

5. The Plan was noncontributory for employee participants and their dependents of the Plan.

5. The Plan was noncontributory for employee participants and their dependents of the Plan.

6. Participation in the Plan was voluntary.

7. Earth Systems, at all times relevant, was responsible for remitting all fees, premiums, and claim payments to Great-West.

8. Earth Systems was required to perform certain functions with respect to the Plan. Earth Systems generally endorsed the Plan, and in addition, performed the following tasks:

(a) determined the design and amendments to the Plan, and decided the coverage and levels of coverage that employees and their dependents were entitled to receive (e.g., Earth Systems determined the size of deductibles and what benefits would be provided with a range of benefits to be paid by Great-West on behalf of the Plan);

(b) provided an accurate accounting of its Plan participants to Great-West for the purpose of determining participation levels and eligibility of its employees under the Plan;

(c) enrolled its employees in the Plan;

(d) distributed the Plan's "Summary Plan Description" (the "SPD") describing Plan benefits to its employees and their dependents upon enrollment in the Plan;

(e) provided the employee claim forms (proof of loss) that the employee filled out and returned to Great-West for claim processing; and

(f) certified eligibility of participants.

9. The Plan document contains an express "Provision for Right of Recovery" (the "Provision"). The Provision entitles the Plan to recover sums that are available from a third party, or third party insurer. The Plan expected by inclusion of the Provision contained within the SPD that the Plan will be reimbursed to the extent of benefits paid, or an amount agreed upon, when a participant makes a recovery from a third party, or third party insurer. The Plan vested the Board of Trustees with the discretion to interpret the Plan, and the Board delegated this responsibility to me in my capacity as a member of the Board of Trustees. A true and correct copy of the express "Provision for Right of Recovery" and the section of the Plan vesting me with discretion to interpret the Plan is attached as Exhibit A hereto.

10. I have interpreted the Plan regarding its right to recover the amount of benefits paid by the Plan on behalf of Janette Knudson. The Plan is entitled to recover 100% of the $411,157.11 paid by the Plan on behalf of Janette Knudson out of the $650,000.00 that she has recovered in her state court action. I have made this determination for several reasons. First, after Ms. Knudson suffered her injuries and while she was incapacitated, her husband, Eric Knudson, executed and returned under cover letter of Janette Knudson's attorney a "right of recovery agreement" wherein he agreed, on her behalf, to reimburse the Plan up to the amount of benefits paid if his wife made a

third-party recovery. A true and correct copy of the "right of recovery agreement" is attached as Exhibit B hereto. Second, and in any event, the terms of the Plan state that the Plan "will have a first lien upon any recovery . . . that the Covered Person receives from . . . the third party" and the lien will not exceed "the amount of benefits paid. . . . " Thus, under the Provision, the Plan is entitled to recover to the extent of benefits paid. Also, since the Plan states that it has a "first lien" on the recovery, the Plan is entitled to recover fully and in first order of priority of payment whether or not Janette Knudson is made whole. Finally, since the Plan states that it is entitled to a "first lien" up to the amount of benefits paid, and since the Plan does not provide that it will pay a portion of Janette Knudson's legal fees and costs, the Plan's recovery should not be reduced to pay a pro-rata share of Janette Knudson's attorney's fees and costs.

11. The provisions discussed above establish that the first sentence of the Right of Recovery provision – ("We will, at our sole option, have the right to recover from the Covered Person any payment for benefits paid for treatment of such Loss under this Booklet which the Covered Person is entitled to receive from the third party.") – does not mean that the Plan's recovery can be limited by an allocation by a covered person's attorney in a settlement agreement of a small amount of settlement funds to past medical expenses, which represents only a fraction of the benefits paid by the Plan. Instead, this sentence introduces the concept that if benefits are paid, and a covered person may be able to seek recovery for the Loss that caused benefits to be paid, but the Plan will be entitled to recover the full amount of benefits paid to the

Covered Person. The remaining portions of the Provision explain the extent of the recovery right. Any other interpretation of this sentence would render the rest of the Provision meaningless.

12. I have determined that the Plan should always receive 100% reimbursement to the extent of benefits paid so that the Plan retains maximum control over efforts to recover from third parties. Additionally, the overall goal in requiring full reimbursement is to provide the greatest amount of benefits to all covered persons under the Plan at the least cost and to protect plan assets.

13. Earth Systems delegated to Great-West the duty to perform certain non-discretionary services for the Plan. The services include benefit determination in accord with the terms of the Plan's SPD, benefit payments in accord with the Plan's SPD, and direct payment of benefits to Plan participants or their assigns. I have interpreted the services provided by Great-West to include notification and enforcement of the Plan's subrogation and/or rights of recovery.

14. The Plan maintained a Stop-Loss Policy to protect the Plan from catastrophic loss. Earth Systems was the designated contract holder and recipient of sums payable through stop-loss.

I declare under penalty of perjury of the laws of the United States that the forgoing is true and correct.

Dated: 8/20/97 /s/ Jerol J. Brown
Jerol J. Brown

Thomas H. Lawrence, TN Bar No. 17105
Lewis, Fisher, Henderson & Claxton
5050 Poplar Ave. Suite 1717
Memphis, Tennessee, 38157
(901) 767-6160

Linda Claxton, CA Bar No. 125729
12100 Wilshire Boulevard, Suite 600
Los Angeles, California 90025
(310) 820-3150

Attorneys for Plaintiffs
Great-West Life & Annuity Insurance Company, the Health and Welfare Plan for Employees of Earth Systems, Inc., and Earth Systems, Inc., the Plan Administrator for the Health and Welfare Plan for Employees of Earth Systems, Inc.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC. Plaintiffs, v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Defendants.	Case No. CV-97-3745 JMI (Jgx) **SUPPLEMENTAL DECLARATION OF JEROL J. BROWN** Date: March 23, 1998 Time: 10:00 a.m. Place: Courtroom of the Hon. James Ideman

SUPPLEMENT DECLARATION OF JEROL J. BROWN

I, Jerol J. Brown, declare as follows:

1. I, at all relevant times, have been a Trustee of the Earth Systems, Inc. Employee Benefits Trust (the "Trust"), which was created pursuant to the Trust Agreement. A true and correct copy of the Trust Agreement is attached hereto as Exhibit 1. I make this declaration in support of the Plaintiffs' motion for summary judgment and in opposition to Defendants' motion for summary judgment. I have personal knowledge of the matters stated herein and could testify competently thereto if called upon to do so in a court of law.

2. I, as Trustee, with the consent and agreement of the other trustees, delegated to Earth Systems, Inc. the authority to act on behalf of the Trust (to the extent Earth Systems, Inc. did not already possess that authority as the plan sponsor and a fiduciary of the Plan) and to, among other activities, contract on behalf of the Trust and the Plan for such administrative services and insurance, including stop loss policies, as might be required to operate the Trust and the medical plan and to retain a third party administrator to assist in operating the Plan. Accordingly, it has been at all times my intention and understanding as Trustee that Earth Systems, Inc. is a duly authorized legal representative of the Trust, with the power to enter into the agreements with Great-West Life & Annuity Insurance Company ("Great-West"). The Minutes of the Board of Directors Meeting held on September 8, 1989 establish that the Trustees of the Trust at that time (myself, Carl Greenlee, and Albert Gribaldo), along with the Board of Directors of Earth Systems, Inc., agreed that

Earth Systems, Inc. should enter into an Administrative Services Only agreement with Great-West. True and correct copies of those minutes are attached hereto as Exhibit 2. The other activities performed by Earth Systems, Inc., with the approval of the Trustees, are set forth in ¶ 8 of my initial Declaration.

3. I was authorized pursuant to the Trust Agreement to interpret the Earth Systems Inc. Summary Plan Description, which I did for this case on August 20, 1997 when I executed my initial Declaration. The Declaration incorrectly identifies the Flexible Benefits Plan as the document that vests me with the discretion to interpret the Plan. In fact, the Trust Agreement provides me with that discretion. I determined that it was necessary to interpret the Right of Recovery Provision in the Plan to ensure that Earth Systems, and thus the Trust, recovered the maximum amount it was entitled to recover. In that way, the participants and beneficiaries would receive the maximum amount of benefits at the least cost.

4. In my initial declaration, I stated that the Plan was entitled to recover 100% of the $411,157.11 of benefits paid on behalf of Janette Knudson out of the $650,000 she recovered in her state court action. Knudson's attorney questioned me about this in my deposition and asked why his scheme to allocate only $13,828.70 to past medical expenses did not defeat the Plan's claim to full reimbursement. He directed me to a portion of the Summary Plan Description that states that first lien would not exceed the amount of medical treatment received by the covered person and asked me how that affected my interpretation.

5. I first explained that the Plan has a first lien right of recovery to the extent of benefits paid and, thus, the first dollars recovered are to be allocated to the Plan's first lien regardless of how a covered person and the party she sues choose to allocate the recovery. Thus, the first dollars recovered are presumed to be for medical expenses.

6. The provision Knudson's attorney referred to – that the lien will not exceed the amount received by the covered person for such medical treatment from the third party – applies in situations where the covered person recovers less than the amount of the benefits paid. In that situation, the lien would be limited to the amount of the total recovery. I then provided an example of why I interpreted it the way I did: I want to sell my house to another person (the buyer) for $550,000. The bank has a first lien on the house of $400,000. What I might do is try to make an agreement with the buyer to sell him my house for $500,000 instead of $550,000. I then tell him that if he will allocate only $50,000 of his money to my first lien, then I will sell him my backyard garden hose for $450,000. I then take the $50,000 to the bank and apply $50,000 to pay off my first lien, even though the first lien is $400,000. I'll take the remaining money and apply that to the garden hose, which has no lien on it, and I have made out "scott free". I save $350,000, the buyer saves $50,000 but the bank – the first lienholder – gets fleeced. This would not be allowed.

7. Attached as Exhibit 3 are true and correct copies of the portions of minutes of several Board of Directors meetings pertaining to medical benefits for employees. These minutes show the types of escalating medical costs

that Earth Systems has experienced over the past decade and the measures taken to control those costs. The increasing costs and number of claims between 1988 and the present have caused Earth Systems, Inc. to scale back benefit levels, raise deductibles, and begin requiring employee contributions. Enforcing the Right of Recovery provision in this case will provide a benefit to all participants and beneficiaries because it will allow them to obtain the most benefits at the least cost and may prevent further reductions in benefit levels or increases in deductibles or employee contributions.

8. I have reviewed Janette Knudson's Memorandum of Points and Authorities in Support of Her Cross Motion for Summary Judgment. In that memorandum, Knudson contends that any recovery in this case will not benefit the Plan but only Earth Systems, Inc. That is incorrect. Earth Systems, Inc. is obligated to pay some of the $411,157.11 back to Great-West pursuant to the stop-loss contract with Great-West. The remainder of the money will be paid into the Earth Systems Employee Benefits Trust, which will be reactivated when and if a recovery is obtained. That money will be distributed pursuant to the terms of the Trust, for the benefit of all of the participants and beneficiaries in Earth Systems' employee benefit plan.

9. Since 1981, Earth Systems, Inc. has had in place a "plan" for providing medical benefits to employees of its subsidiaries. The Plan has been funded and insured in different ways over the years, and the terms, level of benefits and the name given to the Plan have occasionally changed. However, the same Plan entity has operated and remained in place continuously to the current date,

including the years from 1991 to 1993 relevant to this action.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on 3/6/98 /s/ J J Brown
Jerol Brown

TRUST AGREEMENT

THIS TRUST AGREEMENT is made between EARTH SYSTEMS, INC., having its principal place of business at 1900 Embarcadero Road, Suite 207, Palo Alto, California ("Systems"), and Albert Gribaldo, Carl W. Greenlee and Alvin Rathbun (the "Trustees").

RECITALS

A. Systems has adopted and established the Earth Systems, Inc., Employee Benefits Plan (the "Plan"), effective as of the 1st day of January, 1981.

B. The Board of Directors of Systems has appointed a Board of Trustees (the "Trustees") to administer the Plan in accordance with its terms, and the Trustees have entered into an Agreement with a third-party Service Organization (the "Contract Administrator") to handle claims and other administration for benefits under the Plan.

C. The Plan provides that contributions made by Systems and its Employees ("Participants") shall be held in Trust, invested and thereafter paid out to Participants and their dependents and beneficiaries in order to accomplish the purposes of the Plan.

D. Systems desires to create a Trust associated with the Plan which is intended to qualify as a Tax-Exempt Trust of a Voluntary Employees' Beneficiary Association within the meaning of Section 501(c)(9) of the Internal Revenue Code, as amended, and the Regulations issued thereunder and as a Tax-Exempt Trust under the provisions of the Revenue and Taxation Code of the State of

California. Such Trust is also intended to comply with the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended. The sole purpose of the Association and the Trust is to provide such life, medical, dental, disability, sickness, accident and other benefits as are set forth in the Plan, as may hereafter be amended, to those Employees of Systems who are eligible to participate in the Plan and to their eligible dependents.

NOW, THEREFORE, Systems hereby establishes the Trust Agreement under the Plan, as hereinafter set forth, and the Trustees agree to hold any and all monies which have been or may be paid to them as Trustees hereunder from time to time IN TRUST for the uses and purposes and upon the terms and conditions hereinafter stated.

ARTICLE I

CONTRIBUTIONS

1.1 *Amount*: Systems shall contribute to the Trust, from time to time, such amounts as are equal to the total contributions by Participants plus such additional amounts as may be necessary to fund payment of claims by Participants and to pay the administrative costs of the Plan and the Trust. All such payments, all investments made therewith and proceeds therefrom, less any disbursements which shall, from time to time, be made by the Trustees, are referred to herein as the "Fund." The Trustees shall hold, manage, and administer the Fund as a single Trust pursuant to the terms of the Plan and this Agreement without distinction between the principal and income.

ARTICLE II

TRANSFER FROM TRUST

2.1 *Payments by the Trustees*: The Trustees shall, in addition to their investment accounts, open and maintain one or more checking accounts in a commercial branch of a national or state bank. The Trustees shall, from time to time, transfer monies from the investment assets of the Trust to the checking account(s) for the purposes of paying benefits under the Plan and administrative expenses of the Plan and Trust. The Trustees shall make distributions of monies from such account(s) to such persons, in such manner, at such times and in such amounts as they shall determine.

In addition to or in lieu of establishing the aforementioned checking accounts, the Trustees may, from time to time, transfer monies from the assets of the Trust, by wire transfer or otherwise, to the Contract Administrator or its order, to cover drafts in payment of claims by Participants, issued by the Contract Administrator.

2.2 *Taxes*: The trustees are authorized to pay from the Trust assets all real and personal property taxes, income taxes and other taxes of any kind levied or assessed under the existing or future laws against the Trust assets. The Trustees shall not be personally liable for any such taxes.

2.3 *Alienation*: The benefits, proceeds, payments or claims of any Participant or Dependent payable from the Trust assets shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary. Any attempt to

anticipate, alienate, sell, transfer, assign, pledge, encumber, garnish, levy or otherwise dispose of or execute upon any right or benefit payable hereunder shall be void. The Trust assets shall not, in any manner, be liable for or subject to the debts, contracts, liabilities, engagements or torts of any Participant entitled to benefits hereunder and such benefits shall not be considered an asset of the Participant in the event of his insolvency or bankruptcy.

2.4 *No Diversion of Assets*: No part of the Trust assets shall inure the benefit of any private shareholder or individual other than through payment of benefits under the Plan.

ARTICLE III

ACTIONS OF TRUSTEES

3.1 *Named Fiduciary*: The Trustees appointed by the Board of Directors of Systems to administer the Plan shall be the Plan Administrator as defined in Section 3(16)(A) of ERISA and the fiduciary with the rights, powers, duties, responsibilities, discretion and immunities set forth in the Plan.

3.2 *Trustees Sole Responsibility*: The Trustees shall have sole responsibility for the exercise of their rights and duties as set forth in the Plan, specifically including the determination of the existence, nonexistence, nature and amount of rights and interests of all persons in the Trust and the authority to direct the investment, management and control of Trust assets and to appoint Investment Managers to so direct the Trustees in the investment, management, and control of Trust assets.

3.3 *Maintenance of Records*: The Trustees shall have the sole duty and responsibility to maintain any individual Participant records and to prepare and file all reports and other information required by any federal or state law or regulation relating to the Trust and the Trust assets, or delegate responsibility therefore, except for such reports or information returns as are required by law to be prepared and filed by the Trustees.

3.4 *Designation of Agents*: The Trustees shall, in their sole discretion, have the right to appoint such agents as they may deem necessary to carry out their duties pursuant to the provisions of the Plan and this Trust.

3.5 *Miscellaneous*: Notwithstanding any other provisions contained in this Agreement, the parties hereto specifically authorize and direct any member of the Board of Trustees to sign and execute Internal Revenue Service Form 1024 or any similar form, on behalf of this Trust for the purpose of applying for an initial ruling or determination by the Internal Revenue Service that this Trust is exempt from taxation under Section 501(c)(9) of the Internal Revenue Code.

ARTICLE IV

THE TRUSTEE

4.1 *Acceptance*: The Trustees hereby accept this Trust and agree to perform their duties hereunder. They shall receive Systems' and Participants' contributions and shall hold such contributions in the Trust Fund, together will [sic] all income therefrom and all additions thereto, in trust, pursuant to the terms hereof and for the exclusive benefit of the Participants and their beneficiaries.

ARTICLE V

INVESTMENT OF TRUST ASSETS

5.1 *Fiduciary Responsibilities:* The Trustees shall be the sole fiduciaries with respect to the investment, management and control of the Trust assets contributed by Systems and/or Participants with full discretion in the exercise of such investment, management and control. The appointment, selection and retention of any Investment Manager shall be solely the responsibility of the Trustees. The Trustees are authorized and entitled to rely upon the fact that said Investment Manager is at all times a qualified Investment Manager, as defined in Section 3(38) of ERISA, until such time as the Trustees receive a written notice from Systems to the contrary.

5.2 *Duty of Care*: The fiduciaries of this Trust, whether the Trustees or the Investment Manager, responsible for the investment, management and control of Trust assets, shall discharge such responsibility solely in the interest of the Participants and beneficiaries of the Plan for the exclusive purpose of providing benefits to Participants and their beneficiaries and defraying reasonable expenses of administering the Plan with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person, acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and by diversifying the investments of the Plan so as to minimize the risk of large losses, unless, under the circumstances, it is clearly prudent not to do so and in accordance with the documents and instruments governing the Plan and this Trust, insofar as such documents

and instruments, are consistent with the provisions of this Trust.

5.3 *Liability of Fiduciaries*: The parties hereto agree that each of the fiduciaries under the Plan and Trust shall be solely responsible for its acts or omissions. Except as to the extent imposed by the provisions of ERISA, as amended from time to time, no fiduciary shall have the duty or right to question whether any other fiduciary is fulfilling all of the responsibilities imposed upon such other fiduciary by ERISA, as the same may be amended from time to time, or by any regulations or rulings thereunder. No fiduciary shall have any liability for a breach of fiduciary responsibility of another fiduciary with respect to the Plan and this Trust Agreement unless he participates knowingly in such breach, knowingly undertakes to conceal such breach, has actual knowledge of such breach and fails to take reasonable remedial action to remedy said breach or, through his negligence in performing his own specific fiduciary responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach of the latter's fiduciary responsibilities.

ARTICLE VI

TRUSTEES' GENERAL POWERS

The Trustees shall have the following general powers, in addition to any powers and authorities set forth elsewhere herein, and in addition to and not in limitation of the powers granted and confirmed by law, all of which shall be exercised in the Trustees' fiduciary capacity, as Trustees:

(a) To hold, manage, invest and reinvest the principal and income of the Trust Fund pursuant to the then applicable provisions of this Trust Agreement, without distinction between principal and income, and in any property, real or personal, regardless of where situated, which may be an allowable investment under the provisions of this Agreement.

(b) To hold, manage, invest and reinvest the principal and income of the Trust Fund, in any portions, without distinction between principal and income, and in any property, real or personal, regardless of where situated, including without limitation stocks, common or preferred, bonds, notes, debentures, shares or interests in investment trusts, securities, mortgages, other evidences of indebtedness or ownership in real property, improved or unimproved (all at times hereinafter referred to individually and collectively as "property").

(c) To accept and hold property in the form in which received, in cash or uninvested.

(d) To purchase or otherwise acquire and hold property at any time and upon any terms and conditions.

(e) To sell or otherwise dispose of property at any time and upon any terms and conditions.

(f) To exercise options, rights and privileges to acquire or convert property into similar or other property, to make such acquisitions or conversions, and to accept, hold or dispose of such property.

(g) To hold, manage, operate, improve, mortgage, or lease, and to collect, receive and receipt for rents, issues, profits and other income from property.

(h) To carry insurance on property, with mutual insurers or otherwise, against all risks, for any amount, and upon any terms.

(i) To vote in person or by proxy, or to refrain from voting shares of stock, securities or voting rights in other property.

(j) To join in, dissent from, or oppose any dissolution, liquidation, merger, consolidation, reorganization, recapitalization, readjustment or sale of assets of any such property.

(k) To borrow money for any periods and upon any terms, conditions and security, and to mortgage, pledge, or hypothecate such property as may be required to secure such loans.

(1) To deal with claims, controversies, demands or obligations for or against the Trust Fund, and to enter into any agreements, compromises, settlements, or other dispositions thereof.

(m) To execute, acknowledge, and deliver any instruments and documents in any form.

(n) To use income, proceeds of the disposition of property, or other receipts of any kind for any purpose not inconsistent with the provisions of the Trust Fund

(o) To employ and compensate administrators, agents, accountants, legal counsel (who may be the same as for the Trustor) and other assistants and advisors.

(p) To hold and retain the principal and income of the Trust Fund undivided until actual division shall

become necessary in order to make payment or distribution.

(q) To exercise any rights of election or other rights which may be available to the Trustees.

(r) To classify and allocate receipts of income or corpus, or of disbursements as charges against income or corpus.

(s) To do all acts, to take proceedings and exercise all rights and privileges, although not specifically mentioned herein, as may be necessary to carry out the provisions of the Trust Fund.

(t) To continue to act pursuant to the terms and conditions of this Agreement until actual final distribution of the principal and income of the Trust Fund.

(u) To purchase out of the funds of the Trust Fund, a Group Insurance Policy or Policies from an insurer or insurers of the Trustees' selection, which policy or policies shall provide eligible Plan Participants with such Group Insurance as the Trustees may determine.

(v) To enter into a contract with an insurer to provide indemnification of the Trust Fund in the event of loss, on account of benefits payable to eligible Plan Participants, which is in excess of a maximum loss as determined, from time to time, by the Trustees.

(w) To enter into a contract with an insurance, service or administrative organization, which contract shall provide for the manner in which such organization is to receive, review, process and pay benefits to, or on behalf of, eligible Plan Participants in accordance with any plan to be funded hereunder. If the Trustees shall enter into a

contract with any insurance, service or administrative organization for the purpose of administration of any plan of benefits established by the Trustees hereunder, the Trustees are specifically authorized and empowered to agree to indemnify and hold harmless such insurance, service or administrative organization from any premium taxes or similar gross receipts taxes, related interest, fines or penalties and reasonable expenses incurred in any legal effort to avoid such taxes, interests, fines or penalties which arise out of or in the course of the performance of the administrative functions delegated to such organization by the Trustees.

(x) To exercise all right or privileges granted to a policyholder by the provisions of each policy or allowed by the insurance carrier of such policy, and may agree with such insurance carrier to any alteration, modification, or amendment of such policy, and may take any action respecting such policy or the insurance provided thereunder, which may be necessary or advisable, and such insurance carrier shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with such policy.

(y) To cancel any policy or policies of insurance which the Trustees have caused to be issued and may purchase in lieu thereof other like insurance from a carrier or carriers, as provided in Paragraphs (u), (v), and (w) above.

(z) All of the foregoing powers and authority of the Trustees may be exercised by them as often as they, in their sole and absolute discretion, may deem advisable without application to or approval by any court.

(aa) In addition to the foregoing, and to all of the specific powers and authorities granted in other places herein, the Trustees shall have such powers and authorities which, in their sole discretion, are reasonably necessary to carry out the intent and purposes of this Trust and the Plan, as either may be amended from time to time.

ARTICLE VII

ACCOUNTS OF THE TRUSTEES

7.1 *Records*: The Trustees shall maintain accurate records and accounts of all transactions hereunder, which shall be available at all reasonable times for inspection or audit by any Plan Participant or any person or persons designated by Systems.

7.2 *Reports*: Within ninety (90) days following (a) the close of each fiscal year of the Trust (which shall correspond to the Plan year) or (b) the effective date of the removal or resignation of the Trustees, the Trustees shall file with Systems a written account setting forth all transactions affected by them subsequent to the end of the period covered by their last previous annual accounting, and listing the assets of the Trust, showing carry and market values of such assets, at the close of the period covered by such account. If Systems so directs, the Trustees shall also submit to Systems such interim valuations, reports or other information as Systems may reasonably require.

ARTICLE VIII

TERMS, RESIGNATION AND REMOVAL OF TRUSTEE(S)

8.1: The Trustees named in this Trust Agreement agree to serve in such capacity until they shall voluntarily resign or shall be removed by Systems. Upon the resignation or removal of any Trustee, Systems shall appoint a replacement Trustee who shall serve in such capacity until his resignation or removal. Replacement Trustees shall be appointed by Systems no later than thirty (30) days following the effective resignation or removal of a Trustee as provided hereunder.

8.2: A Trustee may resign at any time by delivering to the remaining Trustees a written notice of resignation, to take effect no less than sixty (60) days after delivery thereof, unless such time shall be waived by the unanimous consent of the remaining Trustees.

A Trustee may be removed by unanimous request of the remaining Trustees by written notice of removal to take effect no less than sixty (60) days from delivery thereof, unless such time should be waived by the removed Trustee.

Upon removal or resignation, all future liability of such Trustee shall terminate, with the exception that such Trustee shall continue to have the obligation to execute, acknowledge and deliver all documents necessary to transfer and convey all right, title and interest in the Trust assets, together with the Trustee's rights and privileges, to any Successor Trustee, and to account for its tenure as Trustee.

ARTICLE IX

RIGHT TO AMEND

Systems reserves the right, for itself and its successors, to amend the Plan and Trust in whole or in part at any time by resolution of its Board of Directors or that of any such successors by delivering a certified copy of any such Board of Directors' resolution to that effect to the Trustees.

ARTICLE X

AMENDMENT AND TERMINATION

Any amendment shall be stated in an instrument in writing executed by Systems or the Trustees, as the case may be, and this Trust Agreement shall be amended in the manner and at the time therein set forth, and Systems and the Trustees shall be bound thereby; provided, however:

(a) No amendment shall be effective which shall attempt to cause any of the assets of the Trust to be used for or diverted to purposes other than for the exclusive benefit of Participants or their dependents or beneficiaries except that such changes, if any, as may be required to permit the Trust to meet the applicable requirements of the Internal Revenue Code, as now in effect or hereafter amended, may be made;

(b) No amendment shall have any retroactive effect so as to deprive any Participant of any benefit already vested, except that such changes, if any, as may be required to permit the Trust to meet the applicable

requirements of the Internal Revenue Code, as now in effect or hereafter amended, may be made;

(c) No amendment shall create or effect any discrimination in favor of Participants who are officers, shareholders or highly compensated employees; and,

(d) No amendment shall increase the duties or liabilities of the Trustees without its written consent.

ARTICLE XI

SUCCESSION AND ADOPTION

In the event of a liquidation, dissolution, merger, consolidation, reorganization or transfer of Systems, or its property to a successor continuing and carrying on the Trustor's business, any such successor, with the written consent of the Trustees, may adopt this Trust Agreement and be substituted for Systems hereunder by delivering a certified copy of the resolution of its Board of Directors to that effect to the Trustees.

ARTICLE XII

TERMINATION OF PLAN

13.1 *Employer*: Systems has established the Plan and Trust with the intention and expectation of maintaining it indefinitely but Systems may, at any time, for business, financial or other good causes, terminate the Plan and Trust by delivering a certified copy of a resolution to that effect to the Trustees. This Plan and Trust shall also terminate in the event Systems is legally adjudicated a bankrupt, makes a general assignment for the benefit of

creditors, or is liquidated and dissolved, or transfers its business or its property without any successor hereto.

13.2 *Distribution Upon Termination*: Upon the termination of the Trust as herein provided, any and all monies remaining in the Plan after the payment of all expenses shall be used for the continuance of one or more benefits of the type provided by the Plan, until such monies have been exhausted.

ARTICLE XIII

APPLICABLE LAW

The Plan and Trust Agreement shall be construed, administered and governed in all respects under applicable Federal Law, and to the extent that Federal Law is inapplicable, by the laws of the State of California.

ARTICLE XIV

ACTIONS BY SYSTEMS

All actions of Systems taken pursuant to the provisions of this Trust Agreement shall be evidenced by a certified copy of an appropriate resolution of the Board of Directors of Systems which shall be delivered to the Trustees.

IN WITNESS WHEREOF, Systems and the Trustees have caused this Agreement to be executed, by their respective duly authorized officers, as of this 1st day of December, 1980.

EARTH SYSTEMS, INC.

By: /s/ Albert Gribaldo, President
Albert Gribaldo

By: /s/ Alvin Rathbun,
Alvin Rathbun
Vice-President, Secretary-Treasurer

("Systems")

/s/ Alvin Rathbun
Alvin Rathbun, Chairman

/s/ Albert Gribaldo
Albert Gribaldo

/s/ Carl W. Greenlee
Carl W. Greenlee

("Trustees")

Linda Claxton, Esq. (Bar No. 125729)
LEWIS FISHER HENDERSON & CLAXTON, LLP
333 South Grand Avenue, Suite 3680
Los Angeles, California 90071
(213) 680-3410

Thomas H. Lawrence, Esq. (TN Bar No. 017105)
LEWIS FISHER HENDERSON & CLAXTON, LLP
5050 Poplar Avenue, Suite 1717
Memphis, Tennessee 38157
(901) 767-6160

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS INC., THE PLAN FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., Plaintiffs, v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Defendants.	Case No. CV 97-3745 JMI (JGx) SECOND SUPPLEMENTAL DECLARATION OF JEROL J. BROWN (Filed Mar. 16, 1988) Date: March 23, 1998 Time: 10:00 a.m. Ctrm: Hon. James M. Ideman

I, Jerol J. Brown, declare as follows:

1. I, at all relevant times, have been a Trustee of the Earth Systems, Inc. Employee Benefits Trust (the "Trust"), which was created pursuant to the Trust Agreement. I have personal knowledge of the matters stated herein and could testify competently thereto if called upon to do so in a court of law.

2. The only plan documents that the Health and Welfare Plan for Employees of Earth Systems (as it was called from 1989 – 1993) (the "Plan") was operated under during the times that benefits were paid on behalf of Janette Knudson, were the Earth Systems, Inc. Summary Plan Description (endorsed originally by ESI and the Trustees in 1989 and again in 1991) and the Trust Agreement entered into in 1981. I was responsible for, among other things, managing the financial administration of the Plan at all times relevant hereto. I handled the finances of the Plan by estimating the cost of benefits for the participants and beneficiaries in each of the Earth Systems, Inc. ("ESI") subsidiaries. I would then require each subsidiary to pay the monthly share of that cost into the Trust. I would then use the funds in the Trust to fund benefits that Great-West initially paid as our claims service administrator. If and when our stop-loss attachment points were reached, and Great-West returned money to ESI under the stop-loss contract, I deposited those funds directly into the Trust account. True and correct copies of worksheets, checks, explanation sheets, and deposit slips that evidence much of this process are attached as exhibits to my deposition and are attached as Exhibit 27 to Knudson's Appendix of Exhibits. None of the funds paid to ESI by Great-West were retained by ESI. In fact,

because of the increasing costs of the Plan, ESI was many times required to supplement the funds in the Trust to meet all of the Plan's obligations.

3. The level of benefits provided to participants and beneficiaries decreased after 1993, when ESI terminated its agreement with Great-West because of spiraling costs and began funding its Plan through insurance.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on 3/16/98 /s/ J.J. Brown
Jerol Brown

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12100 Wilshire Boulevard, Suite 600, Los Angeles, California 90025. On **March 16, 1988**, I served the foregoing document described as: **SECOND SUPPLEMENTAL DECLARATION OF JEROL J. BROWN**

___ by placing___ the original _X_ a true copy thereof enclosed in a sealed envelope addressed as follows:

Jeffrey S. Pop, Esq.
Jeffrey S. Pop & Associates
9107 Wilshire Boulevard, Ste. 600
Beverly Hills, California 90210

___ **BY EXPRESS MAIL**

___ ___ I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

___ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
Executed on **March 16, 1998**, at Los Angeles, California.

___ ___ **BY PERSONAL SERVICE** I delivered such envelope by hand to the offices of the addressee.
Executed on **March 16, 1998**, at Los Angeles, California.

XX ___ **FEDERAL** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

LINDA CLAXTON /s/ Linda Claxton
Signature

JEFFREY S. POP & ASSOCIATES
Jeffrey S. Pop, Esq. – State Bar #054343
9107 Wilshire Boulevard
Suite 600
Beverly Hills, California 90210
(310) 273-5462 ♦ (310) 274-7749 (Fax)

Attorneys for Defendant
JANETTE KNUDSON

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., AND EARTH SYSTEMS INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC., Plaintiffs, v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual, Defendants.	Case No.: CV 97-3745 JMI (JGx) **DEFENDANT JANETTE KNUDSON'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT; DECLARATIONS OF JEFFREY S. POP AND JANETTE KNUDSON ATTACHED HERETO** Date: February 23, 1998 Time: None Set Ctrm: 5 (Judge James M. Ideman) (Filed May 18, 1998)

All exhibits refer to exhibits in the Appendix, which is filed concurrently herewith, except for reference to declarations or depositions, which may be lodged separately. Documents are not numbered in logical sequence since the Stop Loss Contract was overlooked during Plaintiff's response to defendants' demand for documents and was produced after the deposition of Fry and during the deposition of Tuccitto. The Trust Agreement also was not produced until January 22, 1998, the second day of the deposition of Jerol Brown. It is marked as Exhibit 39.

UNCONTROVERTED FACTS	**EVIDENCE**
1. Earth Systems, Inc., executed and created a Trust Agreement, dated December 1, 1980, which acknowledges that Earth Systems Inc. had adopted and established the "Earth Systems Inc. Employee Benefits Plan ("The Plan"), effective January 1, 1981.	Exhibit 39, Trust Agreement, dated December 1, 1980, Recital "A"; Batestamp No. 809; Brown Depo. 170:22-171:7.
♦ ♦ ♦	
3. The Trust Agreement executed December 1, 1980 between the Trustees and Earth Systems, Inc., appoints a Board of Trustees to administer the "Earth Systems, Inc.	Exhibit 39, Trust Agreement dated December 1, 1980, Recital "B" Batestamp No. 809; Brown Depo. 170:22-171:7.

Employee Benefits Plan" which was effective as of January 1, 1981.

4. The Trust Agreement in Recitals Section C, states that "The Plan provides that contributions made by Systems and its employees ("Participants") shall be held in Trust, invested, and thereafter paid out to participants and their dependents and beneficiaries in order to accomplish the purposes of the Plan."

Exhibit 39, Trust Agreement dated December 1, 1980, Recital "C", Batestamp No. 809; Brown Depo. 170:22-171:7.

5. The Trust Agreement states a portion of in Section D, "The sole purpose of the association and the trust is to provide such life, medical, dental, disability, sickness, accident and other benefits as set forth in the plan, as may hereinafter be amended, to those employees of Earth Systems who are eligible to participate in the plan and to their eligible dependents."

Exhibit 39, Trust Agreement dated December 1, 1980, Recital "D"; Batestamp No. 809; Brown Depo. 173:12-174:10.

6. Plaintiff Great-West Life & Annuity Assurance Company (hereinafter

Exhibit 6, Services Agreement, Batestamp Nos.

referred to as "Plaintiff Great-West") entered an agreement for services with Earth Systems, Inc. and the Plan Administrator, effective January 1, 1990.

213-218; Tuccitto Depo. 30:17-31:20.

7. Under the Service Agreement, in Article IV, it was expressly agreed that "under no circumstances shall Great-West be designated as plan administrator or a fiduciary of the Plan. Nothing herein shall be deemed to constitute Great-West a party to the Plan or to confer any authority or control respecting management of the Plan, authority or responsibility in connection with administration of the Plan."

Exhibit 6, Article IV, Authority in Control and Management of Plan, Batestamp No. 215; Tuccitto Depo. 34:5-35:10.

8. The Service Agreement provided that no event shall an incorrect determination of any benefit be the responsibility of Great-West.

Exhibit 6, Services Agreement, Article V, Indemnification and Limitation of Liability, Batestamp No. 215; Tuccitto Depo. 35:22-36:1.

9. Plaintiff Great-West sold Earth Systems, Inc. a "Stop-Loss Contract" for insurance, dated February 27, 1990, effective January 1, 1990.

Exhibit 17, Stop-Loss Contract, Batestamp Nos. 267-275; Tuccitto Depo. 73:1-6.

10. The only parties to the Stop-Loss Contract were Earth Systems, Inc., "the contract holder" and Great-West Life and Annuity Insurance Company, "the insurer."	Exhibit 17, Stop-Loss Contract, Batestamp No. 267-275; Tuccitto Depo. 72:1-73:26; Brown Depo. 108:16-22.
11. The Stop-Loss Contract sold by Great-West to Earth Systems, Inc. provided for both a specific stop-loss benefit and for an aggregate stop-loss benefit.	Exhibit 17, Stop-Loss Contract, Articles II and III, Batestamp No. 270; Tuccitto Depo. 73:7-74:7.
12. Under the Stop-Loss Insurance Contract, after the premiums were paid, Great-West had the duty to pay Earth Systems, Inc. as contract holder, a benefit equal to the excess under either the specific stop-loss benefit or the aggregate stop-loss benefit.	Exhibit 17, Stop-Loss Contract, Articles II and III; Batestamp No. 270; Fry Depo. 46:14-47:3, 57:15-58:5, 96:3-17.
13. The Stop-Loss Contract by its terms did not create any rights or obligations on the part of Great-West with respect to persons covered under the Plan or their beneficiaries.	Exhibit 17, Stop-Loss Contract, Article VIII, Batestamp No. 273; Tuccitto Depo. 74:17-75:9.
14. The Stop-Loss Insurance Contract between Great-West and Earth Systems, Inc. was amended twice, the last being on	Exhibit 19, Batestamp No. 280; Brown Depo. 98:12-101:3, 102:1-103:2.

September 16, 1991. The specific stop-loss amount in Schedule A was increased. It was increased to $75,000. This stop-loss insurance remained in effect until December 31, 1993.	
* * *	
16. Effective December 31, 1993, the Services Agreement with Great-West was not renewed, and the Stop-Loss Contract was terminated.	Tuccitto Depo. 31:9-20; Fry Depo. 45:17-46:22.
17. Commencing on January 1, 1994, Earth Systems, Inc. Employee Benefits Plan purchased insurance through Prudential Care, which now administers the new ERISA Health Care Plan for the employees of Earth Systems, Inc. It is not self-funded.	Brown Depo. 30:11-31:18, 32:19-22.
18. The Stop Loss Insurance Contract in Schedule A which was effective August 1, 1991 through December 31, 1993, provided that "all money recovered by Great-West under the right of recovery provision will be distributed as follows: (1) first to Great-West, to be applied	Exhibit 19, Stop-Loss Contract Amendment, Pg. 2, Schedule A, Batestamp No. 281.

to reduce Great-West's payments of specific stop loss benefits to the contract holder, pursuant to Article II of this contract; (2) secondly, to Great-West to be applied to reduce Great-West's payment of aggregate stop loss benefits to the contract holder, pursuant to Article III of this contract; and (3) thirdly to the contract holder."

19. The Stop-Loss Contract stated as amended, "Nothwithstanding anything to the contrary expressed or implied herein, Great-West shall have the sole right to make claims under the right of recovery provision contained in the Plan. In its sole discretion, Great-West may litigate, negotiate, settle, compromise, release or waive any such claim. The contract holder signs to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive any such claim."

Exhibit 19, Stop-Loss Contract Amendment, Schedule A, Batestamp Nos. 280-281.

20. The Stop-Loss Contract provided the sharing of legal expenses, on a pro rata basis, between Earth

Exhibit 19, Stop-Loss Contract Amendment, Schedule A, Batestamp No. 281.

Systems, Inc., the contract holder and Great-West, depending on the outcome of the litigation.

21. Timely notice of the following legal proceedings was given to the legal department of Earth Systems, Inc. agent for process designated in the summary plan description and to Great-West: (1) On March 26, 1997, Defendant's "Notice of Motion and Motion to Approve Settlement and Petition for Order Directing the Money to be Paid to the Janette Knudson Special Needs Trust (Probate Code §3611) and for Order Approving Settlement, Including Disbursement for MediCal and Others Disputed Creditors; Declaration of Janette Knudson and Jeffrey S. Pop, attached hereto, Points and Authorities; Exhibit 11 and (Proposed) Order filed separately and concurrently herewith scheduled for April 23, 1997;" (2) On July 3, 1997, a similar Motion Petition and Order as described in (1) above was noticed for hearing on July 23, 1997; (3) on

Stipulation of Undisputed Facts by the Parties; Declaration of Jeffrey S. Pop; Exhibit 3, Summary Plan Description 1991 and Service Agreement, Batestamp No. 22-195; Exhibit 5, Judge Farrell's July 23, 1997 Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (Probate Code § 3611) and for the Order approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, Batestamp Nos. 197-212; Exhibit 15, Pop Letter to Tuccitto at Great-West, enclosing client's trust account check no. 2033 for $13,828.70, Batestamp Nos. 263-265; Exhibit 48, Order Granting Plaintiff's Motion to Remand, Batestamp No. 1077-1084; Exhibit 50, Order Denying Plaintiff Ex Parte Application for Temporary Restraining Order, Batestamp No. 1087-1090.

July 9, 1997, James M. Ideman, United States District Judge, issued an order denying Plaintiffs Great-West and Earth Systems, Inc.'s Ex Parte Application for Temporary Restraining Order in Case No. 97 3745 JMI (JGx); (4) on July 23, 1997, Judge Farrell issued an Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (Probate Code §3611) and for Order Approving Settlement, including Disbursement for MediCal and Other Disputed Creditors; (5) on August 1, 1997, the Order Approving the Settlement and Establishment of Janette Knudson Special Needs Trust and Notice of Order was mailed to Plaintiffs; (6) on August 21, 1997, by letter to Great-West, Assistant Recovery Manager, Tuccitto, Pop issued a client's trust check as ordered by Superior Court in the amount of Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70) to Great-West. A copy of the letter was sent by Plaintiffs' counsel.

22. Plaintiffs received notice of the Conditional Release of all Claims attached as Exhibit 2 to the Petition. The Conditional Release stated in part: "The Defendants agree to pay the above-referenced sum of money to settle this disputed and vigorously defended claim. The payment is allocated as partial compensation for Plaintiff due to her catastrophic losses after deduction of attorneys fees and costs as follows: Past Loss of Earnings and Present Value of Future Loss of Earnings: 5%
Past Medical Expense: 5%
Present Value of Future Medical Expense: 45%
Lifetime Housing, Transportation, Modifications and Accessories: 5%
Loss of Enjoyment of Life Distress and Long Term Disability: 40%
Total: 100%

Exhibit 38, Notice of Motion and Motion to Approve Settlement and Petition for Order Directing the Net Money to be Paid to the Janette Knudson Special Needs Trust (Probate Code § 3611) and For Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors; Declaration of Janette Knudson and Jeffrey S. Pop Attached Hereto; Points and Authorities; Exhibit 11; and [Proposed] Order Filed Separately and Concurrently Herewith.

The Exhibits included: The Special Needs Trust, Batestamp Nos. 706-726, Conditional Release of All Claims, Batestamp Nos. 728-734; Robert Johnson & Associates Economic Report, Batestamp Nos. 736-742; Gerry Aster Rehabilitation Care Costs, Batestamp Nos. 744-752; Dr. Thomas Hedge's Medical Report, Batestamp Nos. 751-768.

23. The Petition before State Court included Economist, Robert W. Johnson's Report which indicated the present value of the future cost of Ms. Knudson's medical expenses are $2,593,900 and that the present value and for future loss of earnings for Ms. Knudson is $818,829.00.	Exhibit 38, Robert Johnson Economic Report, Batestamp No. 736.
24. The Petition for State Court also included an estimation of rehabilitation and care cost by Jerry Aster, Rehabilitation Consultant (Exhibit 4) and Medical Report by Thomas L. Hedge, Jr., M.D. of the Pacific Region Spine and Head Injury Care System, Center for Rehabilitation Medical Center, Northridge Hospital Medical Center (Exhibit 5). These reports confirmed the catastrophic and permanent injuries, Janette Knudson, a quadriplegic received and the future medical problems and needs which are required.	Exhibit 38, Notice of Motion and Motion to Approve Settlement and Petition for Order Directing the Net Money to be Paid to the Janette Knudson Special Needs Trust (Probate Code § 3611) and For Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors; Declaration of Janette Knudson and Jeffrey S. Pop Attached Hereto; Points and Authorities; Exhibit 11; and [Proposed] Order Filed Separately and Concurrently Herewith. This Exhibit includes Conditional Release of All Claims, Batestamp Nos. 728-734; Robert Johnson & Associates Economic Report, Batestamp Nos. 736-742; Gerry Aster Rehabilitation Care Costs, Batestamp Nos. 744-752; Dr. Thomas Hedge's Medical Report, Batestamp Nos. 751-768 and the Special Needs Trust, Exhibit 38, Batestamp Nos. 706-726.

25. The Summary Plan Description in the provision for Right of Recovery states, in part, "We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, that the covered person receives from: . . . the third party; or . . . the third party's insurer or guarantor; or the covered person's uninsured motorist insurance. This lien will not exceed: • The amount of benefits paid under this booklet for the treatment of the loss; or • The amount received by the covered person for such medical treatment from the third party. The Summary Plan Description (Exhibit 3) and the language under the Right to Recovery Provision was before the Superior Court.	Exhibit 25, Summary Plan Description, Batestamp No. 391; Exhibit 38, Provision for Right of Recovery, Batestamp Nos. 769-775; Exhibit 3, Summary Plan Description and Service Agreement 1991, Batestamp Nos. 22-195.

26. The Summary Plan Description identifies "Denise Shelton, Human Resources Manager for Earth Systems, Inc." as the Plan Administrator for Plaintiff, Health and Welfare Plan for the Employees of Earth Systems, Inc.	Exhibit 25, Summary Plan Description, Batestamp No. 108; Brown Depo. 138:3-11.
27. Denise Shelton has given no interpretation of the Right to Recovery provision in the Summary Plan Description for Plaintiff, the Health and Welfare Plan for Employees of Earth Systems, Inc.	Brown Depo. 34:6-35:6

* * *

29. Trustee Brown admitted that the Janette Knudson Special Needs Trust is not a "covered party" as defined in the Plan. In fact, the term "covered party" is defined in the Summary Plan Description as "covered person" means you and those of your dependents who are covered under this booklet.	Brown Depo. 205:24-206:6; Exhibit 25, Summary Plan Description, Article VI, Batestamp No. 390.
30. Judge Farrell's Order Approving Settlement ordered (1) that the Janette Knudson Special Needs Trust,	Exhibit 5, Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (*Probate Code* § 3611)

Dated March 23, 1997, is approved and shall be established and administered in accordance with its terms and conditions; (2) that Janette Knudson has special needs as defined in Probate Code § 3604, etc., and that the disbursement to the Janette Knudson Special Needs Trust, as set forth in Paragraph 4, is substantially less than the present value of the future medical expenses of Janette Knudson as established by evidence set forth in Exhibits 3, 4 and 5 attached to the Petition.	and for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, Batestamp No. 197-212.
31. Judge Farrell, in his Order, in Paragraph 6 of Exhibit 5, specifically found that the allocation of the net settlement proceeds is fair and approved. The Court by its order considered the evidence of the present value of the future medical expenses and the present value of the future loss of earnings. The Judge then compared the value of the future medical expenses, based on a forty-	Exhibit 5, Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (*Probate Code* § 3611) and for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, Batestamp No. 197-212.

five (45%) percent allocation, as compared to the amount allocated to Great-West for past medical expenses and loss of earnings. The Court found that these relationships demonstrate that Great-West has been provided a proper percentage of the settlement for the portion of reimbursement for past medical expenses actually recovered.

32. The Court Order in Paragraph 6 recited that the health insurance policy, under which the initial medical payments for benefits were paid had been reviewed. The Court found that the reimbursement to Great-West is limited to the amount of the net settlement received by Knudson for reimbursement of her past medical expenses and that the payment of $13,828.70 was fair and proper.

Exhibit 5, Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (*Probate Code* § 3611) and for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, Batestamp No. 200-201.

33. On August 21, 1997, Jeffrey S. Pop, by client trust account, disbursed funds to Medi-Cal and Great-West, as ordered by the Court. The Janette Knudson Special Needs Trust was funded directly by Defendant Hyundai in the amount of $260,015.88, as ordered by the Court.

Exhibit 15, Pop letter dated August 21, 1997 to Tuccitto, Batestamp Nos. 263-265; Stipulation of Undisputed Facts by the Parties.

34. The Petition and supporting exhibits provided Great-West and Earth Systems, Inc. of notice that Plaintiff Knudson was requested by Superior Court to interpret the Summary Plan Description Right to Recovery Provision in order to enforce her right to have a limit placed on the amount of the lien.

Stipulation of Undisputed Facts by the Parties; Declaration of Jeffrey S. Pop dated March 26, 1997, ¶ 's 11-22, Batestamp Nos. 699-703; Exhibit 38, Petition, ¶ 's 10-15, Batestamp Nos. 683-687; Declaration of Janette Knudson dated March 28, 1997, Batestamp Nos. 692-695.

35. The Summary Plan Description under the provision for Right to Recovery established a first lien which was limited by the following language:

"This lien will not exceed:

- The amount of Benefits paid under this booklet for the treatment of the loss; or
- The amount received by the Covered person for such medical treatment from the third party.

Exhibit 25, Summary Plan Description dated January 1, 1992 IV-7, Batestamp No. 774.

36. The allocation of the settlement proceeds as set forth in the conditional release of all claims and as adopted by Judge Farrell is just and fair in light of the complex disputed nature of the claim against Hyundai and the permanent and lifetime care requirements for Janette Knudson, a quadriplegic and the relationship of the total loss to the net benefits available in settlement.	Exhibit 5, Order Approving Settlement and Petition Directing the Net Monies to be Paid to the Janette Knudson Special Needs Trust (*Probate Code* § 3611) and for Order Approving Settlement Including Disbursement for Medi-Cal and Other Disputed Creditors, Batestamp No. 197-212;
37. On April 22, 1997, Great-West filed in Superior Court a Notice of Removal in the case styled *Knudson v. Hyundai Motor of America, Inc., et al.* Case No. LC022329.	Stipulation of Undisputed Facts by the Parties, Federal District Court File, Case No. 97-2801 JMI (ANx); Exhibit 46, Petition for Removal, Batestamp Nos. 1071-1072; Exhibit 47, Batestamp No. 1076-1078; Exhibit 54, Great-West filed an Answer and Counter Claim, Batestamp Nos. 1129-1130.
38. On April 22, 1997, Great-West filed a Petition for Removal in the case styled *Knudson v. Hyundai Motor of America, Inc., et al.; Great-West Life & Annuity Insurance Company, Counter-Plaintiff v. Janette Knudson, Counter Defendant*, Case No. CV 97-2801 JMI (ANx).	Stipulation of Undisputed Facts by the Parties, Federal District Court File, Case No. 97-2801 JMI (ANx); Exhibit 46, Petition for Removal, Batestamp Nos. 1073-1075; Exhibit 47, Batestamp No. 1076-1078; Exhibit 54, Great-West Answer of Counter Claim, Batestamp Nos. 1129-1130.

39. Between April 22, 1997 and June 30, 1997, Knudson through her attorney made Motion for Remand and Great-West through their attorney filed an Opposition to the Motion for Remand. Great-West filed an Answer and Counter Claim against Janette Knudson in the case styled *Knudson v. Hyundai Motor of America, Inc., et al.; Great-West Life & Annuity Insurance Company, Counter-Plaintiff v. Janette Knudson, Counter Defendant*, Case No. CV 97-2801 JMI (ANx).	Stipulation of Undisputed Facts by the Parties, Federal District Court File, Case No. 97-2801 JMI (ANx); Exhibit 46, Petition for Removal, Batestamp Nos. 1073-1075; Exhibit 47, Batestamp Nos. 1076-1078; Exhibit 54, Great-West Answer of Counter Claim, Batestamp Nos. 1129-1130.
40. On June 30, 1997, this Court granted Plaintiff's Motion to Remand and ordered the action remanded to Los Angeles Superior Court.	Exhibit 48, Order signed by James M. Ideman, United States District Judge, Batestamp No. 1079-1084.

CONCLUSIONS OF LAW

1. State Courts have concurrent (forum) jurisdiction to apply ERISA law to adjudicate 29 U.S.C. § 1132(a)(1)(B) issues. 29 U.S.C. § 1132(a)(1)(2).

2. In determining that Janette Knudson did not have to repay the full $411,157.11 in order to fully and completely satisfy her obligations under the Right to Recovery provision in the Summary Plan Description, the State Court was enforcing Janette Knudson's 29 U.S.C. § 1132(a)(1)(B) right not to pay more in reimbursement

than she had recovered from the third party tortfeasor for "such medical treatment."

3. The State Court has already determined the ERISA lien issue. Plaintiffs' failure after notice to subrogate or to enforce their alleged rights preclude them from re-litigating the same issues in this case.

* * *

6. The Make Whole Rule mandates that the insured party be made whole for injury or damages suffered before an insurance company recovers benefits it paid to the insured party. The compromised settlement did not make Janette Knudson whole. *Barnes v. Indep. Auto Dealers* 64 F.3d 1389 (9th Cir. 1995) The Summary Plan Description of a right to first lien upon any recovery is limited by its terms to the amount received by the covered person for such medical treatment from the third party. The Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70) is a fair apportionment. *Mongeluzo v. Barter Travenol Long Term Disability Benefit Plan* 46 F.3d 938 (9th Cir. 1995)

* * *

8. An ERISA (Health) Plan may be amended only be [sic] written amendment. 29 U.S.C. § 1102, *Borst v. Chevron* 36 F.3d 1308 (5th Cir. 1994) rehearing and suggestion for rehearing en banc denied, 42 F.3d 639, certiorari denied 115 S.Ct. 1699, 514 U.S. 1066, 131 L.Ed.2d 561 (1994). Any oral amendment which adds or deletes words from the plan is void and cannot be relied upon by Plaintiffs. Therefore, Trustee Brown's declaration which did not consider the limitation on the amount of lien is

similar to an oral amendment deleting the language which stated that "This lien will not exceed: . . . or the amount received by the covered person for such medical treatment from the third party." This is *not* possible.

9. 29 U.S.C. § 1022 requires a Summary Plan Description (SPD) be furnished to "participants and beneficiaries" of any employee benefit plan. 29 U.S.C. §§ 1021(a) and 1022. Therefore, Defendant Knudson has the right to rely upon the information in the document.

* * *

11. 29 U.S.C. § 1103(c) prohibits the assets of an ERISA Plan inuring to the benefit of the employer. The Stop-Loss Agreement between Earth Systems, Inc., the employer, and Great-West, the insurance company, provides for any recovery under the Right to Recovery provision to benefit Great-West and then to Earth Systems, Inc. but not the ERISA Plan. This agreement violates this ERISA provisions. 29 U.S.C. 1103(c).

12. 29 U.S.C. § 1106(a)(1)(D) prohibits a fiduciary from engaging in a transaction if he knows or should know that such transaction constitutes a direct or *indirect* . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. The transfer of rights under the provision for the Right of Recovery by the employer to Great-West benefits a party-in-interest. A fiduciary cannot indirectly aid the employer to violate the anti-inurement rule.

* * *

16. Defendant Knudson is entitled upon application and proof to reasonable attorney fees and costs pursuant to 29 U.S.C. § 1132(9)(e) and 1132(9)(i).

Dated: February 2, 1998

JEFFREY S. POP & ASSOCIATES

By: /s/ Jeffrey S. Pop
Jeffrey S. Pop, Esq.

Attorneys for Defendatn [sic]
JANETTE KNUDSON

IT IS SO ORDERED

DATED 5/18/98

JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

DEFENDANT'S STATEMENT OF
UNCONTROVERTED FACTS

Thomas H. Lawrence, TN Bar No. 17105
OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.
SunTrust Center, Suite 800
424 Church Street
Nashville, TN 75201-7812
(615) 254-1900,
(615) 254-1908 fax

Attorneys for Plaintiffs
Great-West Life & Annuity Insurance Company,
the Health and Welfare Plan for Employees of
Earth Systems, Inc., and Earth Systems, Inc.,
the Plan Administrator for the Health and
Welfare Plan for Employees of Earth Systems, Inc.

JEFFREY S. POP & ASSOCIATES
Jeffrey S. Pop, Esquire – State Bar #054343
9107 Wilshire Boulevard
Suite 600
Beverly Hills, CA 90210
(310) 273-5462, (310) 274-7749 fax

Attorneys for Defendant
Janette Knudson

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC. AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC. Plaintiffs, v. JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual Defendants.	CASE NO. CV-97-3745 JMI (Jgx) **STIPULATION OF FACTS BETWEEN THE PARTIES** (Judge James M. Ideman) FILED 98 FEB 13

Thomas H. Lawrence, Esquire on behalf of GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYERS OF EARTH SYSTEMS, INC. AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYERS OF EARTH SYSTEMS, INC., Plaintiffs and Jeffrey S. Pop, Esquire on behalf of JANETTE KNUDSON, Defendant, hereby stipulate to the following facts which are *not* disputed:

1. On March 26, 1997, Jeffrey S. Pop, on behalf of Janette Knudson, sent by mail a document entitled "NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AND PETITION FOR ORDER DIRECTING THE NET MONEY TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (*PROBATE CODE* § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDI-CAL AND OTHER DISPUTED CREDITORS; DECLARATION OF JANETTE KNUDSON AND JEFFREY S. POP ATTACHED HERETO; POINTS AND AUTHORITIES; EXHIBIT 11; AND [PROPOSED] ORDER FILED SEPARATELY AND CONCURRENTLY HEREWITH". The foregoing document was received by mail and/or Express Mail by Great-West Life & Annuity Insurance Company ("Great West"). The Notice of Motion stated that the hearing date for the Motion was April 23, 1997 in Superior Court.

2. On April 22, 1997, Great-West filed a Notice of Filing Notice of Removal in State Court and a Notice of Removal in Federal Court and thereby removed the action to Federal District Court in Case No. CV 97-2801-JMI (Anx);

3. On June 30, 1997, the Order granting Plaintiff's Motion to Remand and Order Remanding Action to Superior Court was filed by the United States District Judge, James M. Ideman;

4. On July 3, 1997, Plaintiff Janette Knudson renoticed and filed in Superior Court, Case No. LC 022329 a "NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AND PETITION FOR ORDER DIRECTING THE NET MONEY TO BE PAID TO THE JANETTE

KNUDSON SPECIAL NEEDS TRUST (*PROBATE COURT* § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDI-CAL AND OTHER DISPUTED CREDITORS; POINTS AND AUTHORITIES IN SUPPORT THEREIN; DECLARATION OF JEFFREY S. POP IN SUPPORT THEREOF." The Notice of Motion stated that the hearing date was July 23, 1997. The foregoing documents were mailed to, and received by, both Great-West and Earth Systems, Inc.

5. On or about July 8, 1997, Great-West Life and Earth Systems, Inc., Plaintiffs, made an Ex Parte Application for Temporary Restraining Order in Case No. CV 97-3745 JMI (Jgx) and served the Verified First Amended Complaint on Janette Knudson and her attorney, Jeffrey S. Pop, along with the Ex Parte Application for Temporary Restraining Order;

6. On July 9, 1997, James M. Ideman, United States District Judge, issued an Order denying Plaintiff's Ex Parte Application for Temporary Restraining Order in Case No. 97-3745 JMI (Jgx);

7. On July 23, 1997, Judge Farrell issued an ORDER APPROVING SETTLEMENT AND PETITION DIRECTING THE NET MONIES TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (*PROBATE CODE* § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDI-CAL AND OTHER DISPUTED CREDITORS.

8. On August 1, 1997, the ORDER APPROVING THE SETTLEMENT AND THE ESTABLISHMENT OF THE JANETE KNUDSON SPECIAL NEEDS TRUST was

mailed to, and received by, both Earth Systems, Inc. and attorneys for Great-West.

9. On August 21, 1997, by letter to Great-West, Assistant Recovery Manager, Louis A. Tuccitto, Pop issued a client's trust check in the amount of Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70) to Great-West. A carbon copy of the letter was sent to and received by counsel for Plaintiffs.

10. On August 22, 1997, Attorney Lawrence faxed to Attorney Pop a letter notifying him that all funds should be segregated pending the outcome of the Federal Court case.

11. On August 22, 1997, Attorney Pop faxed and mailed a letter to Attorney Lawrence informing him that the monies Attorney Pop received had been disbursed and the Special Needs Trust was funded directly by Hyundai.

The foregoing facts as to the timing of events are undisputed and hereby stipulated to by the parties.

Dated:
February 9, 1998

JEFFREY S. POP & ASSOCIATES

By: /s/ Jeffrey S. Pop
Jeffrey S. Pop, Esq.

Attorneys for Defendant
Janette Knudson

Dated:
February 9, 1998

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/ Thomas H. Lawrence
Thomas H. Lawrence, Esq.

Attorneys for Plaintiffs
GREAT-WEST LIFE &
ANNUITY INSURANCE
COMPANY, ET AL.

[Proof Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, et al., Plaintiffs, v. JANETTE KNUDSON, et al., Defendants.	CV 97-3745 JMI (JGx) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED MAY 18 1998

IT IS HEREBY ORDERED:

The following motions came before the Court on March 23, 1998:

Plaintiff's Motion For Summary Judgment;
Plaintiff's Motion For Preliminary Injunction;
Plaintiff's Motion To Disqualify Defendant's Counsel;
Plaintiff's Motion To Strike Defendant's Jury Demand;
Plaintiff's Motion To File Second Amended Complaint;

Defendant's Request For Judicial Notice;
Defendant's Motion For Summary Judgment.

Pursuant to Federal Rule of Civil Procedure 78 and Central District of California Local Civil Rule 7.11, the Court dispensed with oral argument on the motions, and Court took the motions under submission. After careful and exhaustive review, considering all pertinent papers

on file, the arguments, and materials presented by the parties, the Court hereby takes judicial notice of requested documents, GRANTS Summary Judgment in favor of Defendants, and DENIES the remaining motions.

BACKGROUND

This action arises under the Employee Retirement Income Security Act of 1974 ("E.R.I.S.A."), codified at 29 U.S.C. § 1001, *et seq.* Plaintiff Great-West Life & Annuity Insurance Company ("Great-West") is the assignee for collection of the health and welfare plan for employees at Earth Systems, Inc. ("Earth Systems"). Defendants are Janette and Eric Knudson, husband and wife. Mr. Knudson was an employee of Earth Systems when he and his wife were involved in an automobile accident which left Mrs. Knudson a quadriplegic for life.

The Health and Welfare Plan for Employees of Earth Systems ("The Plan") paid out $411,157.11 in medical benefits for Janette Knudson's medical care. The Plan had a "Stop-Loss" insurance agreement with Great-West, whereby the Plan would pay any benefits up to $75,000 and Great-West would pay any excess amount. Additionally, the stop-loss allowed Great-West the right to recover first from amounts paid to the Plan by third parties. The stop-loss limits the Plan's risk of dissipating all of its assets for a single member.

Defendants in 1993 sued Hyundai Motors of America, and others, in L.A. Superior Court. Though Plaintiff Great-West was the assignee with rights of subrogation on an E.R.I.S.A. funded policy, it did not at any time seek to intervene in that action. Instead, when the Knudsons

and Hyundai agreed on a $650,000.00 settlement and notified Great-West that the Superior Court would rule on the fairness of the settlement and status of liens on the settlement, Great-West removed that case to federal court (*Knudson, et al. v. Hyundai Motors of America, Inc., et al.*, CV 97-2801 JMI (ANX)). This Court remanded that case because Great-West, a non-party in that action, had no right to remove the case.

At the same time, Plaintiffs filed the instant action (probably to hedge their bets against remand in the other case). Plaintiff Great-West alleges that it is entitled to $411,157.11 of any settlement proceeds because it paid out that amount in plan benefits to pay for medical expenses. Because the E.R.I.S.A. plan provided for first-lien reimbursement of medical expenses recovered from third parties, Plaintiff Great-West argues that it is entitled to injunctive relief.

Following remand, the Superior Court considered the fairness of the settlement and the status of creditors' liens on settlement funds. The settlement agreement, which provided $650,000.00 to the Knudsons, allocates damages as follows:

Loss of Earnings	5%
Past Medical Expense	5%
Future Medical Expense	45%
Loss of Enjoyment of Life; Distress; Long-Term Disability	40%
Other	5%

Because past medical expenses reflect only five per cent of the settlement amount, Plaintiff Great-West was not entitled to full subrogation under the settlement agreement. By Orders on July 23, 1997 and August 1, 1997 the Superior Court approved the settlement and directed payment of funds to the Janette Knudson Special Needs Trust and to disputed creditors. Under the authorized settlement, Knudson's attorney sent a check to Great-West for $13,828.70, five percent of the settlement. Great-West did not cash the check, but requested that Knudson's attorney segregate all of the settlement funds pending the outcome of the present case in Federal Court. Knudson's attorney refused because monies had gone directly from Hyundai to the Knudson Special Needs Trust. Plaintiff's Motion for injunctive relief seeks segregation of the disbursed funds and attorney's fees.

ANALYSIS

The Court decides the motions in the following order because the ruling on certain motions obviate the need to consider the remaining motions:

I. Defendant's Request for Judicial Notice;

II. Cross Motions For Summary Judgment;

III. Plaintiff's Motion To Strike Defendant's Jury Demand;

IV. Plaintiff's Motion For Preliminary Injunction;

V. Plaintiff's Motion To Disqualify Defendant's Counsel;

VI. Plaintiff's Motion For Leave To File a Second Amended Complaint;

I. Defendant's Request for Judicial Notice

Defendant Janette Knudson requests that the Court take judicial notice of certain pleadings and orders of *Knudson v. Hyundai*, Los Angeles county Superior Court Case No. LC 022329 and District Court Case No. 97-2801 JMI (Anx) (while removed and prior to remand). Federal Rule of Evidence 201 allows a court to take judicial notice of pleadings, orders, and decisions by the same or other courts. *See Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203 (9th cir. 1995).

This Court takes judicial notice of the documents associated with motions and orders approving settlement in Superior Court and the file compiled while the case was removed to this Court.

The Court does not expressly rule on the parties' evidentiary objections. However, the Court thoroughly considered each, where pertinent, and disregarded inadmissible evidence. The Court did not base its conclusion on evidence that the Court would deem inadmissible at trial. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990).

II. Cross Motions For Sumary Judgment

Preemption and Exclusive Jurisdiction under ERISA

Defendant Janette Knudson was a "Covered Person" under the Plan. The parties agree that ERISA preempts the substantive state law governing this action. Plaintiffs, however, maintain that ERISA also gives the federal courts exclusive jurisdiction over this dispute, and that the Superior Court lacked subject matter jurisdiction to determine lien rights as defined by the Plan. Further, Plaintiffs argue that they could not pursue their claims for reimbursement in the state court because federal courts have exclusive jurisdiction over actions where a plan seeks equitable relief.

The ERISA statute defines the scope of jurisdiction over ERISA disputes: "State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1) (B) and (7) of subsection (a) of this section." 29 U.S.C. § 1132(e) (1). Paragraph (1) (B) states that a beneficiary may bring a civil action "to enforce rights under the terms of the plan." 29 U.S.C. 1132(a) (1) (B). The state court action to determine the status of liens on Janette Knudson's recovery is an action to enforce her rights under the terms of the Earth Systems Plan.

Plaintiffs note that "State courts have concurrent jurisdiction over ERISA claims *only* if the claim is one by a participant against a plan where the participant is seeking to recover benefits under 29 U.S.C. § 1132(a) (1) (B)." Plaintiff's Points and Authorities, at p.3 n.2 (emphasis added). Plaintiffs misstate the law. The concurrent jurisdiction includes more than "only" what Plaintiffs allege.

See Schwarzer, et al., *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:38 (TRG 1998) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). The statute clearly states that concurrent jurisdiction includes actions to recover benefits, to enforce rights under the terms of the Plan, and to clarify future benefits.

Plaintiffs correctly state that the federal courts have exclusive jurisdiction over an ERISA case seeking injunctive relief. 29 U.S.C. § 1132(e) (1). Plaintiffs seek injunctive relief in this Court but never intervened in the state court action. The fact that Plaintiffs might have sought injunctive relief, does not deprive the state court of jurisdiction to enforce legal rights under the plan. Likewise, the fact that Plaintiffs may have mistakenly thought the state court lacked jurisdiction, does not strip that court of jurisdiction.

Therefore, the Court finds that the Superior Court had subject matter jurisdiction to determine the status of liens on Knudson's recovery.

Standard for Summary Judgement

A motion for summary judgment provides a procedure for terminating without trial actions in which "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the moving party's burden to show the district court that there is an absence of essential evidence to support the opposing party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The court must view the evidence presented in the motion in the light most favorable to the opposing party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Id.* at 249-255.

The Plan's Reimbursement Rights

Plaintiff claims that the terms of the Plan provide for full, first lien, reimbursement to the extent of benefits paid from amounts recovered by the covered person form [sic] third parties. Based on this reading of the Plan, Plaintiffs contend that Knudson should have to pay the first $411,157.11 of any recovery to Plaintiffs. Plaintiffs state that a covered person's allocation of settlement funds is irrelevant to the determination of reimbursement rights where a benefit plan defines the scope of those rights.

Defendant Knudson argues that the Plan expressly limited Plaintiffs recovery to the amount paid out for medical expenses. Because the settlement allocated 5% of the total recovery for past medical expenses, Defendant refuses to pay more than the five percent, less attorneys fees.

The Earth System Plan states that the Plan will pay benefits to a covered party, even when a third party may be liable, but reserves a right of recovery as follows:

> "We will, at our sole option, have the right to recover from the Covered Person any payment for benefits paid for treatment of such Loss under this Booklet which the Covered Person is entitled to receive from the third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, that the Covered Person receives from . . . [third parties].
>
> The lien will not exceed:
>
> – the amount of benefits paid under this Booklet for the treatment of Loss; or
>
> – the amount received by the Covered Person for such medical treatment from the third party."

Exhibit B to Plaintiff's Motion for Summary Judgement. [sic]

The Right of Recovery Agreement Signed by Eric Knudson

In addition to the terms of the Plan, the Plan required that Eric Knudson sign a "Right of Recovery Agreement" prior to the Plan paying any of Janette Knudson's medical bills. *See* Exhibit 16 to combined motions. Unlike the terms of the Plan, the Agreement states that the Plan will have the right to reimbursement from "any" third party recovery and an automatic first lien.

The Agreement contains a number of flaws that render it useless for the purposes of the motions presently before the Court. First, the Agreement clearly misstates the rights as established by the Plan. Second, the Agreement purports to be made in consideration of the Plan paying benefits under the Plan. The Plan cannot use a preexisting obligation as consideration for a later contract. Finally, the terms of the Plan, itself, forbid alteration of the obligations without formally amending the official Plan documents. A plan administrator cannot amend a plan to divert resources from a beneficiary to the employer. *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288,

1292 (9th Cir. 1997). Because the Right of Recovery Agreement misstates the terms and obligations of the Plan, it is appropriate that the Court disregard the Right of Recovery Agreement in determining Plaintiffs rights under the Plan.

Interpretation of the Plan

The terms of the Plan authorize the Plan Administrator to interpret the language of the Plan. Courts will not upset the administrator's interpretation of an ERISA plan unless the interpretation is arbitrary and capricious. *Canseco v. Construction laborers Pension Trust For Southern California*, 93 F.3d 600, 606 (9th Cir. 1996). In this case, Jerol Brown, an employee of Earth Systems, was vested with the authority to interpret the Plan. Mr. Brown interpreted the Plan to allow the Plan through Great-West, as the stop loss carrier, to be reimbursed 100% of any third party recovery. Based on Mr. Brown's interpretation, Great-West, the Plan, and Earth Systems seek to recover all of the $411,157.11 for Defendant's settlement with Hyundai. An interpretation of a plan which imposes additional terms which clash with the terms of a plan is considered arbitrary and capricious. *Id.* Mr. Browns's interpretation of the Plan clashes with the terms of the Plan. A reviewing court should not defer to an interpretation of the Plan that is flawed. *Atwood v. Newmont Gold Co. Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995).

The terms of the Plan are abundantly clear in providing for a first lien and limits of reimbursement. Under the facts of the present case, the Plan is limited to recovering no more than the amount of benefits paid out or the

amount received from a third party for medical treatment. Therefore, Plaintiffs may recover the lesser of, the $411,157.11, or the portion of the $650,000 that is attributable to medical expenses.

Since the Superior Court had proper jurisdiction and concluded that five percent of the settlement is attributed to Plaintiffs' lien, that matter is resolved.

Therefore, Defendants are entitled to summary judgement [sic] finding that five percent of the settlement is allocated to medical expenses.

III. Plaintiff's Motion To Strike Defendant's Jury Demand

The present claim is brought under the ERISA statute, which has been construed not allow for a jury trial. *Spinelli v. Gaughan*, 12 F.3d 853, 857 (9th Cir. 1993). at § 16.45. The right to a jury trial in federal court is a matter of federal law. In this case, where the statutory remedy is more analogous equity, the parties are not entitled to a jury trial. *See Id.*

The Court finds it unnecessary to strike the jury demand in light of the ruling on summary judgment.

IV. Plaintiffs' Motion For Preliminary Injunction

Plaintiffs seek a preliminary injunction to prevent Knudson, her attorney, and the trustee of the Janette Knudson Special Needs Trust from dissipating settlement funds before Plaintiffs are able to obtain a final ruling in the present suit.

The court denies this motion in light of the ruling on summary judgment.

V. Plaintiff's Motion To Disqualify Defendant's Counsel

Plaintiffs move to disqualify Jeffery S. Pop, and the law firm of Jeffrey S. Pop & Associates (collectively "Pop") from representing Defendant Knudson in this action because a conflict of interest exists. Under the terms of Knudson's insurance policy, Plaintiffs have a lien on the proceeds of her personal injury settlement. Pop acknowledged the lien in a letter to Plaintiffs in September 1995. Plaintiffs reason that by acknowledging the lien and then distributing the settlement proceeds as ordered by the Superior Court, Pop created some sort of conflict of interest.

Plaintiffs do not adequately explain their allegations of multiple representation and conflict of interest. The California Bar Rules require written disclosure to a client when the bar member's relationships or interests will affect the representation of the client. *See* California Bar Rules, Professional Conduct Rule 3.31(B). There is no evidence that the mere existence of a lien creates such a relationship. Even if such a situation was created by the facts of this case, the Rules would merely obligate Pop to provide written disclosure.

Plaintiffs further allege that Pop's contingent fee agreement creates a conflicting financial interest. The fee agreement is itself a written disclosure, resolving any potential conflict.

The motion appears meritless.

VI. Plaintiff's Motion For Leave To File Second Amended Complaint

The Court denies this motion in light of the ruling on summary judgment.

CONCLUSION

Summary Judgment is hereby GRANTED in favor of Defendants.

The Court adopts the stipulation of facts between the parties filed on February 13, 1998.

The Court finds law and facts as stated above. Additionally, the Court adopts Defendants' Statement of Law and Facts lodged on February 2, 1998. The Court strikes the following findings because they are either unsupported or unnecessary in the resolution of the present motions:

Uncontroverted facts 2, 15, and 28;

Conclusions of law 4, 5, 7, 10, 13, 14, and 15.

IT IS SO ORDERED.

DATED: May 14, 1998

/s/ James M. Ideman
James M. Ideman
United States District Judge

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, et. al., Plaintiffs-Appellants,

v.

Janette KNUDSON and Eric Knudson, Defendants-Appellees.

No. 89-56472.
D.C. No. CV 97-03745-JMI.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 13, 1999.

Decided Feb. 7, 2000.

Appeal from the United States District Court for the Central District of California, James M. Ideman, District Judge, Presiding.

Before B. FLETCHER, PREGERSON, Circuit Judges, and WEINER,[2] Senior District Judge.

MEMORANDUM[1]

Great-West Life & Annuity Insurance Company ("Great-West"), Earth Systems, Inc. and the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. appeal the district court's judgment adverse to them in their action seeking to enforce a contractual reimbursement provision pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA")

---

[2] Charles R. Weiner, Senior United States Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. Rule 36-3.

§ 502(a)(3), 29 U.S.C. § 1132(a)(3) against Janette and Eric Knudson ("Knudson"). We affirm the district court's judgment but do so on grounds different from those relied on by the district court.

Defendants Eric and Janette Knudson were involved in an auto accident, which left Janette a paraplegic. At the time of the accident, she was covered by the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. ("the Plan"). Following the accident, the Plan paid benefits totaling $411,157.11 to Knudson and her medical providers. The Plan includes a reimbursement provision giving the Plan a right to recover third party payments to Knudson up to the amount of the benefits paid by the Plan. The Plan also had a "Stop-Loss" insurance agreement with Great-West which gave Great-West the right to recover first any amounts reimbursing the Plan. Knudson was required also to execute an agreement to reimburse as a condition of receiving payments under the Plan.

Knudson filed suit in state court against Hyundai Motors and others allegedly responsible for the accident. The parties settled for $650,000. The state court ultimately approved the settlement and resolved the status of various competing lienholders to the settlement.[3] The settlement attributed five percent of the award to prior medical

---

[3] Prior to the state court's final approval of the settlement, Great-West removed the action to federal district court. The district court remanded to state court, noting that Great-West was never a party to the state court action. None of the issues surrounding the removal are before the panel in this appeal and neither party has appealed the state court ruling.

expenses. Knudson's attorney sent a check to Great-West for $13,828.70, representing 5% of the award. Rather than accept this amount, Great-West, Earth Systems, and the Earth Systems Plan filed suit in federal district court claiming entitlement to $411,157.11 of the settlement.

Ruling on cross-motions for summary judgment,[4] the district court held that the plain terms of the Plan limited the Appellants' reimbursement to the amount received by Plan beneficiaries from third parties for medical treatment. Because the state court oversaw the settlement and awarded Knudson only $13,828 for medical treatment, the district court simply acknowledged that the Appellants' right to reimbursement was limited to that amount. The court granted summary judgment in favor of Knudson. The district court also granted Knudson's request for attorneys fees in the amount of $80,497.50.

ERISA provides fiduciaries an exclusive forum in federal courts to enforce provisions of an ERISA plan. See 29 U.S.C. § 1132(e)(1). The Appellants seek to bring an action under 29 U.S.C. § 1132(a)(3) which requires that they be seeking equitable, rather than legal relief. We held, in FMC Medical Plan v. Owens, 122 F.3d 1258, 1262 (9th Cir.1997), that reimbursement of payments made to a beneficiary of an insurance plan by a third party, which

---

[4] Motions for preliminary injunction, disqualification of counsel, the striking of the jury demand, for judicial notice, and to file an amended complaint were also before the district court judge. In this appeal, Great-West has not challenged the district court's rulings with respect to the motions.

Appellants seek here, is not equitable relief within the meaning of § 1132(a)(3).[5]

Appellants contend that Owens was wrongly decided and seek en banc review. However, we have recently reaffirmed the holding in Owens and, therefore, decline to seek en banc review. See Reynolds Metals Co. v. Robert Ellis, ___ F.3d ___ (9th Cir.2000).

We also affirm the district court's award to Knudson of attorneys fees in the amount of $80,497.50.[6] Even in the absence of subject matter jurisdiction, a district court has the power to award attorneys fees. See Moore v. Permanente Medical Group, Inc., 981 F.2d 443 (9th Cir.1992).

Accordingly we affirm the district court's judgment.

AFFIRMED.

---

[5] Owens rests its dismissal on the lack of subject matter jurisdiction. But see Cement Masons Health and Welfare Trust Fund for Northern California v. Stone, 197 F.3d 1003, 1008 (9th Cir.1999) (reaffirming the substantive holding in Owens but dismissing on the merits rather than on subject matter jurisdiction). For our purposes, in evaluating the substantive holding of Owens requiring the dismissal of reimbursement claims for third party settlements under ERISA, the dismissal could be based either on lack of subject matter jurisdiction or on the merits.

[6] Appellants challenge the right to attorneys fees, not the amount.